No. 3856.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

v.

TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK.

Appellees.

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BRIEF OF APPELLANT

Statement of Case

This case comes up on appeal from the District Court for the Southern District of California, Northern Division. In due time after complaint was filed defendants interposed a motion to dismiss in the na-

ture of a general demurrer; the motion was sustained; plaintiff elected to stand on its complaint; and on October 6, 1921, a final decree of dismissal was entered. From that decree this appeal is taken.

The suit is somewhat analogous to a suit to quiet title. In it the United States, as guardian for the surviving remnant of a tribe of Indians from time immemorial living on a described tract in Kern County, California, seeks to have their original title of occupancy and possession, which is fortified by a provision for their protection found in the grant whereby the fee title passed from the Mexican Government, confirmed and established as a species of easement or use to which all rights and titles now belonging to defendants are subject. Compensation is also asked for various acts of wrong and oppression committed by defendants and an injunction to prevent further molestation of the Indians.

An attempt has been made in the complaint to plead none but essential facts, so that an abstract of it cannot adequately represent the original. The following summary, however, may give the Court an outline idea of its contents

1. The suit is brought by authority of the Attorney General of the United States at the request of the Secretary of the Interior in furtherance of the Indian policy of the Government, which is here acting as guardian of a band or tribe of Mission Indians, wards of the United States, and incompetent to manage their own affairs, known as Tejon Indians, and from time immemorial residing on a described tract in Kern County, California. The above

mentioned officials in bringing the suit are acting not only in the general line of their duty and in defense of the general Indian title of occupancy and use, but also under the specific requirements of the Act of Congress of January 12, 1891 (26 Stat. L. 712), directing them to defend Mission Indians residing within any confirmed private grant in the rights secured to them both by the original grant and by the Act of the State of California of April 22, 1850 (hereinafter quoted), which provides that proprietors of land on which Indians reside must not interfere with their possession, although they may, by judicial procedure, obtain a segregation of a sufficiency of land for their separate occupancy, including their home or village.

The jurisdiction of the court is based on the fact that the United States is plaintiff.

(Complaint, Pars. I, III, XI; Transcript, pp. 1, 2, 5, 18, 19.)

2. Defendant, Title Insurance and Trust Company, a California corporation, doing business in Los Angeles, has held since September 19, 1916, the fee title to El Tejon Rancho of some 98,000 acres lying partly in Kern County, California. Defendant, Security Trust and Savings Bank, also a California corporation doing business in Los Angeles, is trustee under a deed of trust creating a lien on said ranch to secure notes aggregating one million dollars; and the individual defendants, Chandler, Brant, Sherman and Clark, all of whom are residents of the Southern judicial district of California, are in actual possession and control of the ranch under some right or

claim of right apparently derived from Title Insurance and Trust Company, but the precise nature and extent of which plaintiff has been unable to learn.

A portion of said ranch lying in said Kern County and comprising 5,364 acres, with water rights appurtenant thereto, is described by metes and bounds as the subject matter of the suit; and for convenience will be hereinafter called the "Indian tract." All the various titles and rights of defendants in or to said tract are averred to be subject to a right of occupancy, possession and use vested in said Tejon Indians under the following facts:

(Complaint, Pars. II, IV; Transcript, pp. 5, 6, 7, 8.)

3. During the entire time of Spanish and Mexican sovereignty over what is now the State of California, and from time immemorial, the Indian tract, and much circumjacent territory, were continuously occupied by the Tejon Indians, ancestors and predecessors of the present tribe, a peaceful and sedentary people, who resided thereon in permanent dwellings, raising crops, ranging cattle, and collecting the natural products of the soil. They were at that time and still are under the spiritual charge of the Catholic Church and are described as Mission Indians. Under the laws of both Spain and Mexico these Indians were entitled to the undisturbed possession and use of the land they occupied, together with appurtenant water, for habitation, tillage, pasture, hunting, fishing, gathering the natural products of the soil, and all other ordinary purposes. This Indian right and title was protected by said laws as long as

Spain and Mexico held sovereignty over California, and the land in question was charged therewith when it came under the jurisdiction of the United States. (Complaint, Par. V., Transcript, pp. 8-10.)

4. Up to May 30, 1843, the Indian tract lay within the public and ungranted lands of Mexico. On that date two Mexicans petitioned the Mexican Governor of California for the grant of a region known as El Tejon, which included the Indian tract; the regular proceedings were had upon said application, and on June 30, 1845, the grant was finally approved. It contained a condition reading when translated: "They (the grantees) must not interfere with the cultivation and other advantages which the Indians who are found established in said place have always enjoyed." After the United States acquired California under the treaty of Guadalupe Hidalgo, these Mexican grantees petitioned the Board of Commissioners, appointed under the Act of Congress of March 3, 1851, to settle private land claims (9 Stat. L. 631), for confirmation of the grant. The case was heard and on May 8, 1855, confirmation issued. In its opinion the Board said, with reference to the above-quoted condition in the grant: "This restriction we have heretofore decided does not affect the right of property, though it may create a use in favor of the Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal." On appeal, first to the United States District Court and then to the Supreme Court of the United States, the Board's de-

cision was affirmed, and on May 9, 1863, a United States patent was issued conveying to said Mexican grantees certain described premises including the Indian tract. The granting clause of the patent contained the following language: "But with the stipulation that, in virtue of the 15th Section of the said Act (March 3, 1851) the confirmation of this claim, and this patent, 'shall not affect the interests of third persons.'" Thereafter by mesne conveyances the title granted by the patent passed to defendants herein, subject, however, under the facts above recited, to the right of occupancy, possession and use of the Indian tract by the Tejon Indians.

(Complaint, Pars. V, VI, VII, VIII; Transcript, pp. 8-13.)

5. The treaty of Guadalupe Hidalgo in terms protected all existing rights and titles; also, the law of the United States and the law of nations, as often announced by the Supreme Court, uphold said Indian right and title in like manner as did the laws of Spain and Mexico. It could be extinguished by the sovereign only and no sovereignty concerned, including the United States, has ever extinguished, modified or diminished it.

Notwithstanding this, the successors of the original grantors, beginning probably about 1888, commenced a course of oppression and exclusion, gradually forcing the Indians back from the outer limits of the Indian tract, pulling down their houses, destroying their crops, throwing their cultivated fields into cattle range and in other ways narrowing the limits and restricting their use of the land. Defendants, when they acquired title, retained and devoted

to their own use the land thus wrongfully appropriated, and threaten to continue to hold it and perpetually to exclude the Indians therefrom.

Further, defendants have continued and extended the same policy of repression and exclusion, and have made it impossible for the Indians to possess or use the greater portion of the Indian tract at all, or any portion of it peaceably or securely. They refuse to permit any Indian to own so much as one cow to furnish milk for children, or to own horses except so far as they are useful on defendants' ranch, on which some of the Indians labor, or to allow them to improve or repair their huts even when the occupants have obtained material for the purpose. They have interfered with the use by the Indians for irrigation of the creeks flowing through the Indian tract; they have fenced off and are using land once cultivated by the Indians, and still needed by them for their subsistence; when Indians have died or been driven out, they have pulled down their houses, destroyed their improvements and turned their cultivated ground into cattle range, and they have by duress compelled many of the Indians employed on the ranch to submit to a deduction from their wages, under the guise of rent for the premises occupied by them.

Up to the present the result has been that the number of the Indians has been reduced from about 300 to about 80, and the land occupied by them has been diminished from 5,364 acres to about 65 acres, which last mentioned tract is still occupied, used and cultivated by the remnants of the band. Defendants, however, are still pursuing oppressive courses such

as above described and threaten to continue so to do until all the Indians are driven from the Indian tract and their possession and use thereof are totally destroyed.

(Complaint, Par. IX; Transcript, pp. 13-17.)

6. The Indian right of occupancy and use includes the right of ingress and egress to and from said Indian tract over roads connecting said tract with the county roads. It includes a first and prior right of immemorial antiquity in Tejon and Cedar Creeks flowing through the Indian tract to enough water to irrigate the irrigable portions thereof, estimated at 7 cubic feet per second. About 350 acres of the tract are riparian to and continuously irrigable from these creeks, and an additional acreage is irrigable therefrom for early crops. Continuously since 1843 and from time immemorial, the irrigable acreage has been irrigated and cultivated by the Indians except as and when they have been restricted and prevented by defendants, and the acreage still remaining in Indian possession is irrigated by them to the fullest extent permitted by defendants. From 600 to 900 acres of the Indian tract have been cultivated and cropped by the Indians during the same period except as and when defendants have prevented. The remainder has been in their use for cattle range, hunting and gathering the natural produce of the soil, as hereinabove indicated.

A map showing the Indian tract, the land now irrigated and cultivated by the Indians, the land formerly irrigated by them, the arable land within the tract, the former and present irrigation ditches and

other details, is attached as an exhibit to the complaint and is reproduced in the Transcript.

(Complaint, Par. X; Transcript, pp. 17, 18, 22.)

7. Damages for the wrongful acts of defendants are asked under three heads; (a) for the appropriation and use by defendants of the portions of the Indian tract from which the Indians were expelled by defendants' predecessors, $75,000; (b) for the expulsion of the Indians from other portions by defendants, with continued possession and use thereafter, $2500; (c) for the further molestation of the Indians and restrictions and limitations placed on their use and enjoyment of what they still possess, $50,000.

(Complaint, Par. XII; Transcript, pp. 19, 20.)

The prayer is for answer and discovery; for the establishment and confirmation of the Indian title as against the fee title and all other titles of defendants; for a permanent injunction forbidding interference with or molestation of the Indians in their possession and use of the Indian tract, with a temporary injunction, **pendente lite**; for damages in the sum of $127,500, and for general relief.

Defendants moved to dismiss to the bill "on the ground that the same does not state any matter of equity entitling defendant to relief prayed for, nor to any relief, nor are the facts stated sufficient to entitle plaintiff to any relief against these defendants or any of them."

(Transcript, p. 27.)

In support of this they presented two contentions:

1. That the patent issued by the United States to defendants' predecessors in interest is conclusive of the title of defendants, and that such title is free from any and all claims of the nature attempted to be enforced by the complaint.

2. If the Indians had any claims prior to the issuance of the patent, they were abandoned by failure to present them to the Land Commission.

Both of these rested on a single case, Harvey v. Barker, 126 Cal. 262, affirmed in Barker v. Harvey, 181 U. S. 481.

The Court sustained the motion and dismissed the suit without disclosing which of these contentions he approved or whether he upheld them both.

SPECIFICATION OF ERRORS RELIED UPON

All the errors set forth in the Assignment of Errors will be urged. Some of them which separately state different aspects of the same legal position may, however, for brevity be combined and the errors presented in concentrated form, thus:

1. There was error in sustaining the motion to dismiss on the ground of lack of equity in the complaint or lack of facts sufficient to entitle plaintiff to relief, and error in entering judgment of dismissal after plaintiff had elected to stand on the complaint.
(Assignments of Error 1, 2, 3, 4, 5, 6.)

2. There was error in holding thereby, in effect, that the Tejon Indians were intended and required by the Act of Congress of March 3, 1851, to appear before the Board of Land Commissioners created by that Act, there to set up and maintain their title of occupancy and possession, and that by failure to do so, they lost the rights outlined in the complaint.

(Assignments of Error 7, 11, 12.)

3. There was error in interpreting said Act, in effect, to mean that Congress intended tribal Indians, **non sui juris** and incompetent to manage their own affairs, to be charged with knowledge of said Act and its requirements, and that it intended to require such Indians to present their aboriginal title for confirmation under penalty of losing their rights and homes.

(Assignments of Error 16, 17.)

4. There was error in holding thereby, in effect, that the Tejon Indians are not "third persons" whose rights were reserved in the United States patent issued to defendants' predecessors; and that the patent conveyed a title free from and discharged of the Indian easement, trust, or use of occupancy and possession.

(Assignments of Error 8, 9, 10, 20.)

5. There was error in holding thereby, in effect, that by the issuance of said patent, or in any other way, the provision in the Mexican grant forbidding interference with the cultivation and improvements of the Tejon Indians was abrogated or extinguished.

(Assignment of Error 19.)

6. There was error in holding thereby, in effect, that land charged with said Indian title cannot

properly be described as public domain or public land of the United States.

(Assignments of Error 13, 14.)

7. There was error in holding thereby, in effect, that the California Act of April 22, 1850, adopted by Congress as a safeguard for Indians by the Act of January 12, 1891 (26 Stat. L. 712), did not and does not protect said Tejon Indians in accordance with its terms.

(Assignment of Error 15.)

8. There was error in holding thereby, in effect, that the case at bar is governed by Barker v. Harvey, 181 U. S. 481; 126 Cal. 262 and that it is not distinguishable therefrom in its facts; especially in that in Barker v. Harvey it was found that the grant as finally confirmed contained no provision for the protection of the Indians and further that they had in fact voluntarily abandoned their occupancy, whereas in the case at bar the land in controversy has been continuously occupied by the Tejon Indians, and is still occupied by them, except insofar as they have been wrongfully and forcibly expelled, and the Mexican grant, as finally confirmed, contains a specific provision for their protection.

(Assignment of Error 18.)

ARGUMENT

The general topics of discussion will be the Tejon Indians' aboriginal title of occupancy and use, acknowledged by Spain and Mexico up to the time when California came within the jurisdiction of the United States; the special provision for the protection of that title in the Mexican grant here involved;

the undertaking of the United States by the treaty of Guadalupe Hidalgo to respect it; the rights incident to and derivative from it under the laws of the United States, as established by judicial decisions; the purpose and scope of the Act of March 3, 1851, relating to California land claims, with a demonstration from the Act itself that it not only did not require affirmative action by the Indians for the maintenance of their title, but that it expressly reserved it from the operation of the Act and directed the Commissioners to investigate it as a Board of Inquiry only, with power to report but not to adjudicate; principles of statutory construction supporting this conclusion; contemporaneous legislation of Congress and of the State of California to the same effect; later congressional action confirmatory of this view; and an examination of Barker v. Harvey, 181 U. S. 481, the sole case relied upon by appellees, distinguishing it from the case at bar.

The familiarity of this Court with the general title of Indians to land in their occupancy is illustrated by its recent decision in Cramer v. United States, 267 Fed. 78, sustaining several of our contentions here. Yet the nature and incidents of that title have so essential a bearing on the situation existing when the Act of 1851 was passed and on the necessary construction of that Act that we hope to be pardoned for presenting them in some detail. Even if we do not succeed in adding anything new, our citations will at least refresh the Court's recollection as to the doctrines of the Supreme Court governing the various features of the Indian right.

Taking up the above topics in their order:

1. **At the time when California passed under the sovereignty of the United States the Tejon Indians possessed under Spanish and Mexican law an undisputed right and title of possession and use of the land actually occupied by them, being the Indian tract described in the Complaint.**

The complaint in Paragraph V avers that from time immemorial prior to the date of application for the Mexican grant here involved, and during the entire period of Spanish and Mexican sovereignty over the present State of California, the Indian tract, with circumjacent territory, was continuously and exclusively possessed and occupied for agriculture, pasture and residence by the Tejon Indians, being the ancestors and predecessors of the present tribe or band of that name. Paragraph X gives details of their cultivation, water rights and irrigation thereon.

Under these facts, both Spain and Mexico, while claiming the ultimate domain over the lands of the new world, recognized a possessory right in the aboriginal inhabitants which could be disturbed or extinguished by the sovereign only, and which was protected meanwhile by a long series of enactments of uniform tenor. Space permits the quotation of but a very few of these numerous edicts, and we will confine ourselves to those regulating the apportionment of lands in Mexico and the Indies among the Spaniards, but invariably preserving the Indian occupancy and use, and will omit the long array of laws giving general protection to the Indians.

A Spanish decree originating in 1532 and re-enacted in 1553 and 1596, in dealing with the sale, composition and disposition of public lands provides: "To the Indians **should be left their lands, cultivated ground and pastures** in such manner that they may not lack what is necessary, and that they may have all the comfort and repose possible for the sustenance of their houses and families."

Recopilacion de las Indias, Book 4, Title 12, Law 5.
Hall Mexican Law, Sec. 36.
2 White's New Recopilacion, p. 50.

A law of 1588 on the same subject required that "the apportionment of lands in the new settlements, as well as those which are already settled, shall be made without * * * any damage to the Indians."

Recop. de las Indias, Bk. 4, Tit. 12, Law 7.
Hall's Mexican Law, Sec. 38.

"We command that the farms and lands which shall be given to the Spaniards **shall be without prejudice to the Indians;** and that those which have been given to their prejudice or damage shall be returned to whom by law they may belong." (1594.)

Ibid, Bk. 4, Tit. 12, Law 9.
Hall, Sec. 40.

"And there shall be apportioned to the Indians what may be conveniently necessary for them to cultivate and to sow and to raise cattle, **and the lands which they now have shall be confirmed to them** and others which may be necessary shall be given them." (1578 and 1589.)

Ibid., Bk. 4, Tit. 12, Law 14.

Hall, Sec. 45.
Reynolds Spanish and Mexican Land Laws, p. 47.
2 White's New Recop., p. 52.

"We order that the sale, benefit and composition of lands be made with such consideration that the Indians be **left with, above all, what lands shall belong to them,** as well to the individual Indian as to the communities, and **the waters and places of irrigation; and the lands in which they have made ditches for irrigation or any other benefit, with which, by their personal industry, they have fertilized, shall be reserved in the first place,** and in no case can they be sold or alienated." (1642.)

Ibid., Bk. 4, Tit. 12, Law 18.
Hall, Sec. 49.

Even when the Spanish government in the exercise of its sovereign right concentrated the Indians into settlements for convenience in Christianizing and civilizing them, it did not deprive them of the lands from which they had been removed.

"The Indians will be concentrated into settlements with greater willingness and readiness if they do not give up the **lands and profits which they had in the places which they left;** therefore, we command that there be no change in this regard, and that they **keep them as they have held them previously in order to cultivate them and use them for their profit."** (1560.)

Recop., Bk. 6, Tit. 3, Law 9.

A decree of February 9, 1811, provides "that the natives and inhabitants of America can sow and cul-

tivate as much as nature and art shall make competent for them in those climates."

Hall, Sec. 165.

In like manner Article 31 of the regulations of the intendent Morales for granting lands to colonists in Louisiana and West Florida, reads:

"Indians who possess lands within the limits of the Government shall not in any manner be disturbed. On the contrary, they shall be protected and supported, and to this the commandments, syndics and surveyors ought to pay the greatest attention, to conduct themselves accordingly."

2 White's Recop., p. 242.

Citations to the same effect as the foregoing, protecting the Indians' possession from private interference and allowing no diminution of their title except by the government itself might be multiplied indefinitely.

These edicts of the Spanish Crown not only were in force when Mexico achieved its independence in 1821, but survived as a portion of the fundamental law of the new republic.

Hall Mexican Law, Sec. 85.

Rockwell Spanish and Mexican Law, pp. 17-18.

American Insurance Co. v. Canter, 1 Pet 511, 542, 544.

Mitchel v. United States, 9 Pet. 711, 734.

The plan of Iguala of February 24, 1821, outlining the principles of the new government, declared that "all the inhabitants of New Spain, Africans or

Indians, are citizens of this monarchy, with a right to be employed in any post according to their merits and efforts," and that "the person and property of every citizen shall be recognized and protected by the government."

These principles were reaffirmed in the treaty of Cordova, August 24, 1821, between Spain and Mexico, the Declaration of Independence of September 28, 1821, and subsequent enactments (Hall, Mexican Law, Sec. 161) and remained in effect long after Alta California was ceded to the United States.

The status of the Indian land title under both sovereignties is thus summarized by a well-known authority:

"It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of pueblos or ranchos, that the Indians are entitled in equity and good conscience, and even according to the strict rigor of the laws, **to all the lands they have or have had in actual possession for cultivation, pasture or habitation, when such domain can be ascertained to have had any tolerably well-defined boudaries.** Both Spain and Mexico have acknowledged this principle to be a just one. President Juarez acted in accordance therewith when, on the 30th day of September, 1867, he issued his circular to the Governor of Chihuahua, and also extended the same to all the Republic, in which he declared that **the Indians were entitled to the lands of which they had the actual, real and true possession.**"

Hall, Mexican Law, Sec. 159.

This circular, issued under direction of the Pres-

ident by the Department of Justice and Public Works and embodying a scheme whereby the Indians were to receive from the Government gratis the fee title to the lands they held under possessory title, is quoted in full in Hall, Secs. 645-648.

The report of William Carey Jones, appointed by the Secretary of the Interior on July 5, 1849, with instructions to report on land titles in California and to ascertain, among other things, "the nature of the Indian rights as existing under the Spanish and Mexican Governments, and as subsisting when the United States obtained the sovereignty," is found in Senate Document 18, 31st Congress, 1st Session. The following brief excerpts show the tenor of his long dissertation on this topic:

"It is a principle constantly laid down in the Spanish colonial laws that the Indians shall have a right to as much land as they need for their habitations, for tillage and for the pasturage of their flocks. When they were already partially settled in communities sufficient of the land which they occupied was secured them for these purposes. * * * The early laws were so tender of the rights of the Indians that they forbade the allotment of lands to Spaniards and especially the rearing of stock where it might interfere with the tillage of the Indians."

Speaking of the situation subsequent to Mexican independence, he continues:

"We must say, therefore, that, however maladministration of the law may have destroyed its interest, the law itself has constantly asserted the rights of the Indians to habitations and sufficient

fields for their support. * * * I understand the law to be that **wherever Indian settlements are established and they till the ground they have a right of occupancy in the land which they need and use; and whenever a grant is made which includes such settlements, the grant is subject to such occupancy.** * * * I believe these remarks cover the principles of the Spanish law in regard to Indian settlements as far as they have been applied in California, and are **conformable to the customary laws that has prevailed there.**"

Halleck's Report on California Land Titles, pp. 112, 113.

These views have been affirmed by the Supreme Court. For example:

"**They** (the original Indian inhabitants) **were admitted to be the rightful occupants of the soil with a legal as well as just claim to retain possession of it,** and to use it according to their own discretion; * * * The absolute ultimate title has been considered as acquired by discovery **subject only to the Indian title of occupancy which title the discoverers possessed the exclusive right of acquiring.**"

Johnson v. McIntosh, 8 Wheat. 543, 574, 592.

"Spain at all times or from a very early date **acknowledged the Indians' right of occupancy** in these lands. * * * **The grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy has ceased and it was not**

in the power of the Spanish Government to authorize anyone to interfere with it.''

Chouteau v. Moloney, 16 How. 203, 228, 239.

Additional decisions to the same effect will be found hereinafter cited in other connections. They are not added here because we believe our point to be sufficiently established.

(a) **This Indian right was an aboriginal right antedating the sovereignty of Spain or Mexico and not derived from either, but recognized and protected in the amplest manner and from the earliest times by the general law of both.**

The proposition that the Indian title is **original and not derivative** is established by the inherent nature of that title, by the language of the Spanish laws quoted and by repeated decisions of the Supreme Court. It has not only a general but a very special bearing on the construction of the Act of 1851, since the obligations of that Act rested only on those claiming lands by virtue of any right or title **derived** from the Spanish or Mexican Government; and for this reason we will discuss it later at the place where it is immediately relevant. For the present it is enough, as an indication of the trend of authority, to quote very briefly from two cases:

''The Indian nations have always been considered as distinct, independent, political communities, retaining their **original natural rights as the undisputed possessors of the soil from time immemorial.''**

Worcester v. Georgia, 6 Pet. 515, 559.

''Throughout, the Indians, as tribes or nations,

have been considered as distinct, independent communities **retaining their original natural rights as the undisputed possessors of the soil from time immemorial.**"

Holden v. Joy, 84 U. S. 211, 244.

We respectfully ask the Court to notice when it reads the Supreme Court decisions later quoted on this point that they also emphasize the other element of the topic, viz.: that the Indian title under the former sovereignties was not any vague or uncertain right, but a clear-cut, authentic and undisputable title, defined by the limits of actual Indian possession, and repeatedly safeguarded on grounds both of justice and policy (Mitchel v. United States, 9 Pet. 711, 740), by the laws of Spain later carried over as part of the jurisprudence of Mexico and followed by that government as already shown. The Tejon Indians came within the sovereignty of the United States, therefore, in full possession of this established, unquestioned and original property right extending over the entire Indian tract, which right, as we shall presently show, had already been recognized by the law of this country to be as sacred as the fee simple absolute title of the whites.

(b) **The Indian title was further acknowledged and fortified in the case at bar, before the transfer of sovereignty, by the special provision for protection of these Indians found in the Mexican grant above quoted.**

The general laws of Spain and Mexico above cited require that in granting public lands to whites, resident Indians shall be left undisturbed in their

possession, and that that possession shall be confirmed to them. Jones' report above referred to states the law to be that "whenever a grant is made which includes such (Indian) settlements the grant is subject to such occupancy." This principle has been recognized by our Supreme Court.

"It is not meant * * * that the Spanish governors could not relinquish the interest or title of the crown in Indian lands * * *, **but when that was done the grants were made subject to Indian occupancy.** They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize anyone to interfere with it."

Chouteau v. Moloney, 16 How. 202, 239.

Thus the Indian title was protected by general laws and remained unaffected even though not mentioned in the grant.

Sometimes, however, it received special recognition and protection in the terms of the instrument itself. So in United States v. Arredondo, 6 Pet. 691, 693, "said grant is also understood to be made without prejudice to a third party, and especially to the Indians, natives of that land who may have returned or may intend to return to make there their plantations." Similarly, in United States v. Armijo, 5 Wall. 444, 447, "one of the conditions annexed to the grant provided that on no account should the grantee molest the Indians, nor his immediate neighbors." In like manner, in the case at bar, the grant provides that the grantees "must not interfere with (impediran) the cultivation and other advantages which

the Indians who are found established in said place have always enjoyed." (Complaint, Paragraphs VI, VII.)

The map submitted by the petitioners for this grant shows sundry Indian rancherias, so that this is an official assertion that the Indians were already established on the granted premises and were cultivating them; but it is unnecessary to rely on this, since these facts are stated in the complaint and admitted by the motion to dismiss.

The Court will observe that the Tejon Indian title does not rest solely, or even primarily, on this protective condition in the expediente. It rests on two grounds: (1) its status as an original right acknowledged and admitted by a uniform series of general enactments of Spain and Mexico; (2) its specific recognition in the grant as an existing right, non-interference with which is made a condition of the grant itself.

At the time of the treaty of Guadalupe Hidalgo, therefore, the Tejon Indian title, thus generally acknowledged and specially fortified, was as clear, definite and sacred as any property right existing in Mexico.

2. **By the treaty of Guadalupe Hidalgo the United States contracted to preserve and protect all existing rights of property recognized by Mexico, including the foregoing title and right possessed by the Tejon Indians at the date of that treaty.**

Article VIII, Article IX, and Paragraph 2d of the protocol of this treaty (7 Fed. Stat. Ann., pp.

696, 698, 703), amply protect existing Mexican property rights of every description. They are too long for quotation here. Article VIII provides that Mexicans in the ceded territories might remain where they were, "retaining the property which they possess in the ceded territories." Article IX provides that in proper time they should become citizens of the United States, "and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property." The protocol states that "conformably to the laws of the United States legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846." It will be recalled that under the plan of Iguala of 1821, and subsequent Mexican enactments confirmatory thereof (cited above), Indians were made Mexican citizens. So it is directly held in United States v. Ritchie, 58 U. S. 539. The references to Mexicans in the treaty, therefore, necessarily include Indians.

The liberal spirit in which the United States has interpreted these requirements and the fact that the Indian title is covered by them can be established by a few quotations.

"The United States have never sought by their legislation to evade the obligation devolved on them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in pass-

ing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, **the law of nations, the laws, usages and customs of the former government,** and the decisions of the Supreme Court, so far as they are applicable. * * * They have desired to act as a great nation not seeking in extending their authority over the ceded country to enforce forfeitures, but to afford protection and security **to all just rights which could have been claimed from the government they superseded.**"

United States v. Auguisola, 1 Wall. 352, 358.

Speaking of the Act of 1851, passed to define and secure the rights covered by the same treaty, the same Court says:

"It (the Act) recognizes alike legal and equitable rights and should be administered in a large and liberal spirit. **A right of any validity before the cession was equally valid afterwards.**"

United States v. Moreno, 1 Wall. 400, 404.

"Such acquisition (of California) did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection in them **to the same extent as under the former government.** The treaty of cession also **stipulated for such protection.**"

Beard v. Federy, 3 Wall. 478, 491.

"When the United States acquired California the inhabitants were entitled by the law of nations to protection from the new Government **in all rights of property then possessed by them.** * * * Their ownership remained as under the former Govern-

ment and by the term 'property' as applied to land **all titles are included, legal or equitable, perfect or imperfect.** 'It comprehends,' as said by this Court in Soulard v. United States 4 Pet. 511, 512, **'every species of title, inchoate or complete.'** * * * In this respect the relation of the inhabitants to their government is not changed."

Knight v. Land Association, 142 U. S. 161, 201.

The protection of the treaty applies "whether the party had the full and absolute ownership of the land, **or merely an equitable interest therein which required some further act of the Government to vest in him a perfect title."**

Astiazaran v. Mining Co., 148 U. S. 80, 81.

"In harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; **that which was good before should be enforcible after the cession.**

Ely's Administrator v. United States, 171 U. S. 220, 223.

To the same effect, see:

Strother v. Lucas, 12 Pet. 410, 438.
Leitensdorfer v. Webb, 20 How. 176, 177.
Palmer v. Low, 98 U. S. 1, 15.
Brownsville v. Cavazos, 100 U. S. 138, 143.
Botiller v. Dominguez, 130 U. S. 238, 243.
United States v. Chaves, 159 U. S. 452, 457-8.

The language of the above opinions clearly includes the Indian title; and indeed in Barker v. Har-

vey, 181 U. S. 481, 486-7, the sole case relied on by appellees, the Court, quoting from the Astiazaran case, **supra,** admits that an Indian possessory title fell within the class which the United States by the treaty undertook to respect, although on other grounds presently to be distinguished it rejected the Indian claim there presented.

No further demonstration under this head seems necessary.

3. **This Indian title presented no novelty under American law, nor was there anything inconsistent with that law in the undertaking by the United States to protect it, because before and at that time and at all times in the history of our jurisprudence the law of the United States was and still is practically identical with that of Spain and Mexico in this regard, viz.: That Indians have an original right and title of occupancy, possession and use prior to the right or title of Spain, Mexico or the United States, which can be extinguished only by the sovereign and which until so extinguished is as sacred as the sovereign title or the fee title.**

The case at bar presents none of the difficulties which sometimes arise after a cession of territory when the laws of the previous sovereignty are at variance with those of the new. The Indian possessory title, recognized by all the nations participating in the discovery and conquest of the Americas, was acknowledged in the same manner and to the same extent by the United States from the time of its establishment as an independent nation down to the present. This principle is so familiar that two or

three authoritative statements of it will suffice. Decisions to be hereafter quoted as to various incidents of this title will further illustrate the general rule.

Johnson v. McIntosh, 8 Wheat. 542, decided by Chief Justice Marshall in 1823, is a leading case, repeatedly cited and relied on. The Court announces and explains at great length the doctrine that discovery of the Americas by Europeans was construed as giving title to the discovering nation as against all other European nations, and the sole right of acquiring the possessory title from the natives. He points out that this possessory title was uniformly recognized by Spain, France, Great Britain and the American colonies, and, referring to the above principle, says:

"The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country." (p. 587.)

"It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete, ultimate title, charged with this right of possession and to the exclusive power of acquiring that right." (p. 603.)

See also pp. 543, 574.

In speaking of recognition by Spain in Florida of the Indian right as formerly acknowledged by Great Britain, it is said:

"This right was occupancy and perpetual possession **either by cultivation or as hunting grounds**

which was held sacred by the Crown, the Colonies, the States and the United States."

Mitchel v. United States, 9 Pet. 711, 752.

"The United States held the ultimate title charged with the right of undisturbed occupancy and perpetual possession in the Indian nation with the exclusive power in the Government of acquiring that right."

Doe v. Wilson, 64 U. S. 457, 463.

"Indians have rights of occupancy to their lands **as sacred as the fee simple absolute title of the whites.**"

Cherokee Nation v. Georgia, 5 Pet. 1, 48.

"The right of the Indians to their occupancy **is as sacred as that of the United States to the fee.**"

United States v. Cook, 86 U. S. 591, 593.

Quotations could be multiplied without limit. Reference may be made to the following specimen cases:

Worcester v. Georgia, 6 Pet. 516, 579, 584.
Mitchel v. United States, 15 Pet. 52, 83.
Marsh v. Brooks 8 How. 223, 232.
Gaines v. Nicholson, 9 How. 356, 364.
Fellows v. Blacksmith, 60 U. S. 366, 371-72.
Holden v. Joy, 84 U. S. 211, 243-4-5.
Beecher v. Wetherby, 95 U. S. 517, 526.
Buttz v. Northern Pac. Ry., 119 U. S. 55.
Lone Wolf v. Hitchcock, 187 U. S. 553, 564.

4. Some incidents of this Indian title relevant to the situation in the case at bar may be briefly mentioned.

(a) **The Indian title is both legal and equitable in its nature and has been variously likened to an easement, life estate, trust or use with which the fee is charged.**

The following are some of the passages in which the Supreme Court has mentioned its qualities:

"They (the aborigines) were admitted to be the rightful occupants of the soil **with a legal as well as just claim** to retain possession of it and to use it according to their discretion."

Johnson v. McIntosh, 8 Wheat. 542, 574.

"That an action of ejectment could be maintained on an Indian right to occupancy and use is not open to question. This is the result of the decision in Johnson v. McIntosh, 8 Wheat. 574 (see p. 592), and was the question directly decided in the case of Cornet v. Winton, 2 Yerg. (Tenn.), 143."

Marsh v. Brooks, 49 U. S. 223, 232.

"A tenant for life has all the rights of occupancy in the lands of a remainder man. **The Indians have the same rights** in the lands of their reservations."

United States v. Cook, 86 U. S. 591, 594.

"The fee was in the United States. The Indians had merely a right of occupancy, **a right to use** the land subject to the dominion and control of the Government. * * * The discoverers recognized a right of occupancy or **a usufructuary right** in the natives."

Buttz v. Nor. Pac. Ry., 119 U. S. 55, 66-7.

Where Indians conveyed land with the assent of the United States to an individual, but reserved the

right to fish and hunt on the granted premises, as a portion of their original right of occupancy and use, the Court says:

"We assume that they retained **an easement or profit a prendre** to the extent defined; that is not questioned."

Kennedy v. Becker, 241 U. S. 556, 562.
See also United States v. Wynans, 198 U. S. 371, 384.

We have sought in vain for any more exact definition or classification of the Indian title. It resembles an easement in being a burden or charge on the land, but differs in that it is not created either by grant or by prescription, and involves a fuller enjoyment of the premises than that included in any known easement. It resembles the interest of the life tenant as against the remainder man in the extent of use to which the land may be put, but differs in that it is not freely alienable, and that it does not endure for any designated life or lives, but, unless acquired by the government, for the tribal life; i. e., throughout the successive generations through which the tribe endures. It is not a leasehold since there is no rent, no contract of tenancy, no term, and since the Indians hold **under** the United States, but not **from** it. Nor is it an estate at will or by sufferance, since in the former the tenant enters by permission of the lessor and holds from him, and in the latter holds over with no title at all, while here the Indian title, as above shown, is original and not created by the United States. Neither is it a license since a licensee has no permanent interest and indeed no estate what-

ever. That it is a legal estate of some sort, however, to be respected both by the United States and its grantees has been plainly established above.

But the Indian title possesses equitable attributes as well. Johnson v. McIntosh, **supra,** describes it as "a legal as well as a just claim;" i. e., resting not only in law but in equity and good conscience. Indians in general are, and the Tejon Indians are especially described in the complaint as being, incompetent to manage their own affairs, and wards of the United States. The latter holds the fee and the sole power to acquire or extinguish the Indian possession, but if it does either, will in so doing resemble a guardian acquiring or extinguishing the title of his ward, which ward is so peculiarly situated as to have no legal protection or redress against the guardian. This is a condition appealing cogently to equity and good faith, although, as against the sovereign, the Indian title is beyond the protection of the courts. But when the fee passes from the government into private hands, the situtaion is different. The fee, which ordinarily would carry full right of possession and use, is for the time being only a naked fee. The private grantee has the title, but the Indians have the beneficial use until the sovereign which alone has the power to interfere, extinguishes such use. The sovereign conveys the fee with the understanding, express or implied in law, that the Indian possession and use will be undisturbed by the grantee. It is, therefore, a species of lien or trust with which the fee is charged.

"A trust has been * * * defined as * * *

an equitable right, title or interest in property distinct from the legal ownership thereof. * * * It implies two estates or interests, one equitable and one legal, and is said to exist where property is conferred upon and accepted by one person on terms of holding * * * it for the benefit of another * * * or where there are rights, titles and interests in property distinct from the legal ownership."

39 Cyc. 17, 18.

Jones v. Byrne, 149 Fed. 457, 463.

"A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases the legal title in the eye of the law carries with it to the holder absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights to the extent to which they exist are a charge upon the property and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked."

Seymour v. Freer, 75 U. S. 202, 213.

Corbin v. Holmes, 154 Fed. 593, 604.

It is clear that the Indian title comes within the scope of the above definitions. The government, occupying a fiduciary relation to the Indians and their title, passes the fee to a private grantee with the understanding, either implied in law or, as in this case, expressed in terms, that the latter will respect and protect the Indian right. This creates a resulting trust with the grantee as passive trustee. If he violates that trust, as the complaint here alleges to have been the case, a constructive trust or trust **ex maleficio** also arises.

The Indian title appears,, therefore, to be **sui generis.** It is not essential here to classify it exactly. It is necessary only to bear in mind, as has been above demonstrated, that it has both a legal and an equitable side, and that in either aspect it is a charge or use to which the fee title is subject.

(b) **The Indian title is not extinguished by a mere grant in fee by the sovereign; and in the case at bar was further and expressly protected by the terms of the instrument conveying the fee.**

We will here foreclose any contention that a patent or grant from the United States to land in Indian possession necessarily or at all passes the fee free from the Indian title. That a title of its quality, attributes and dignity could not be thus casually or inferentially obliterated is clear in the nature of things, and is shown by many decisions of the Supreme Court. Such was the law under Spain and Mexico and such is the law of the United States. Thus in Johnson v. McIntosh, 8 Wheat. 543, 574, the Court, speaking of the European nations which discovered different portions of America, says that they "claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all **to convey a title to the grantee subject only to the Indian right of occupancy."**

In United States v. Arredondo, 6 Pet. 691, a grantee of Spain whose grant contained a provision that it was to be made without prejudice to Indians (p. 693) petitioned for a confirmation of title as against the United States. The latter claimed,

among other things, that the grant was in fact made with prejudice to the Indians, and that in such event under the laws of Spain, the land was to be returned to its lawful owners. In this particular, the case turned upon an inquiry whether or not the Indians had in fact abandoned the land, but the Court in its general discussion says

"Thus a grant, even by Act of Parliament, which conveys a title good against the King, takes away no right of property from any other; **though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land.**" (p. 738.)

Speaking of grants made by Great Britain and later by Spain of land in the Indian country in Florida, the Court says:

"Both made grants without regard to the land being in the possession of the Indians; **they were valid to pass the right of the Crown subject to their rights of occupancy;** when that ceased either by grant to individuals with the consent of the local governors, by cession to the Crown, or the abandonment of the Indians, the title of the grantee became complete."

United States v. Fernandez, 10 Pet. 303, 305.

"**Grant to individuals**" in this passage means, of course, grant by the Indians of their title to individuals, a practice recognized by Spain in case the local governor approved, as stated in Chouteau v. Moloney, 16 How. 203, 236-7.

In the last mentioned case (p. 239), it is said:

"It is not meant by what has just been said that the Spanish governors could not relinquish the interest or title of the Crown in Indian lands and for more than a mile square, **but when that was done the grants were made subject to the rights of Indian occupancy.** They would not take effect until that occupancy had ceased and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it."

Coming to the principle adopted by the United States in similar situations,—where Congress had made a grant to a railway of designated lands to which "The United States have full title not reserved, sold, granted or otherwise appropriated and free from prescription or other claims or rights," with an undertaking to extinguish the Indian title to any lands affected, the Court says:

"At the time the Act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the lands to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the Government. **The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance.** The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it."

Quoting, with approval, from Clark v. Smith, 13 Pet. 195, 201, the opinion continues:

"The ultimate fee (incumbered with the Indian right of occupancy) was in the Crown previous to the Revolution and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished; **when the patentee took the unincumbered fee.** So this court and the State Courts have uniformly and often holden."

Buttz v. No. Pac. R. R., 119 U. S. 55, 66, 68.

"The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the 200 feet as a right of way to the Company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the Government, and when transferred **without reference to the possession of the lands and without designation of any use of them, requiring the delivery of the possession, the transfer was subject to their right of occupancy.** * * * This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions."

M. K. & T. Ry. v. Roberts, 151 U. S. 114, 116.

To the same effect, see:

Fletcher v. Peck, 6 Cranch. 87, 142.
Johnson v. McIntosh, 8 Wheat. 543, 590.
Mitchel v. United States, 9 Pet. 711, 745.
Marsh v. Brooks, 8 How. 223, 232.

Beecher v. Wetherby, 95 U. S. 517, 525-6.
Wisconsin v. Hitchcock, 201 U. S. 202, 213-14.

Of course the case at bar is a clearer instance of the application of this principle than most of those cited because, when the fee passed from the sovereign, the latter expressly stipulated in the grant for the protection of the Indian possession (Comp., Pars. VI, VII), and the United States when it confirmed the grant expressly excepted outstanding rights not inconsistent with the transfer of the fee.

(c) **The Indian title is extinguished only by words or acts distinctly indicating such purpose, of which there have been none in this case on the part of Mexico or the United States; and in the history of the United States has usually been abrogated by treaty and always on some terms of compensation to the Indians. There has been no compensation here.**

This proposition is a necessary corrolary of (b) above. Since the Indian title is unaffected by a mere grant of the fee even by Act of Congress, and since, nevertheless, the government has authority to extinguish it, such intent to extinguish must be unmistakably shown. Otherwise, the Indian title continues in unimpaired efficacy. Such is the effect of the cases cited under (b).

For example, in Worcester v. Georgia, 6 Pet. 515, the Court thus describes the law prevailing when the Cherokee country was in British hands.

"The King purchased their land **when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them.**" (p. 547.)

This principle prevailed down to and after the Revolutionary War (pp. 548-9) and was adopted by the United States (pp. 552, 579).

In Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, which is mainly concerned with the construction of ambiguous or conflicting Acts of Congress which raised a doubt whether or not certain lands within the Osage territory were included within a railroad land grant, the Court, after reiterating the doctrine of the early cases that the Indian title could not be extinguished except by a voluntary cession, and that meanwhile it was "as sacred as the title of the United States to the fee," continues:

"This perpetual right of occupancy with the correlative obligation of the Government to enforce it **negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company.**" (p. 742.)

And again:

"If Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured **an adequate indemnity to them**" (p. 774),

with much more to the same effect.

In Missouri, etc., Ry. Co. v. Roberts, 152 U. S. 114, where a grant of a railway right of way involved land occupied by Indians, the Court, in a passage already quoted, states that a conveyance by the United States of the fee without designating any use requiring the delivery of possession, leaves the Indian title unimpaired, but concludes that in the case before it,

since the grant of a right of way necessarily involved the use and occupancy thereof by the Railway Company, this amounted to a definite expression of intention to extinguish the Indian title; although not so under "grants of the Government **not indicating its intention, either in express terms or by the uses to which the lands are to be applied,** to change the possession of the lands." (p. 118.)

In United States v. Wynans, 198 U. S. 371, where the Indians in a treaty with the United States had reserved hunting rights over land to which the United States subsequently gave a patent, the Court, after pointing out that the hunting right was **part of the original Indian title** and was not a creature of the treaty, says:

"It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty, **as to the other laws of the land."** (pp. 381-2.)

A clear expression of both elements of the doctrine above stated is found in the concurring opinion of Mr. Justice McLean in Worcester v. Georgia, 6 Pet. 515, 580, viz.:

"The occupancy of their (the Indians') lands was never assumed **except upon the basis of contract and upon the payment of a valuable consideration.** This policy has obtained from the earliest white settlements in this country down to the present time."

To the same effect, is Minnesota v. Hitchcock, 185 U. S. 373, 389.

In case it should be contended that a different

rule applies to land reserved to Indians under a treaty or by other governmental action than to lands merely subject to their original occupancy, Spalding v. Chandler, 160 U. S. 394, 403, states the principle to be the same in both cases.

"The Indian title, as against the United States, was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. **When Indian reservations were created, either by treaty or executive order the Indians held the land by the same character of title.**"

That it has been the policy of the Government throughout not to extinguish the Indian title in any casual or silent way, but expressly to recognize and acquire it is shown by the long series of treaties with Indian tribes from the earliest times until a different mode of safeguarding their rights was provided. This is part of the history of our country of which the Court will take judicial notice. Examples of such treaties will be found in most of the cases cited, as well as in many hereafter mentioned. The Hot Springs cases, 92 U. S. 698, 703-4; Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 734-5, 741, and Buttz v. Nor. Pac. R. R., 119 U. S. 55, 59, 60, 69, may be instanced merely as examples out of a great number

In view of the foregoing, it is hardly necessary to point out that the Indian title is not and cannot be extinguished against their will by private violence and aggression. This was true under the laws of

Spain. In interpreting a grant made subject to Indian occupancy, the Court says:

"The fact of abandonment was the important one to be ascertained; if voluntary the dominion of the Crown over it was unimpaired in its plenitude; **if by force the Indians had the right, whenever they had the power or inclination, to return.**"

United States v. Arredondo, 6 Pet. 689, 747.

It is also true under the laws of the United States. In Fellows v. Blacksmith, 60 U. S. 366, 371, Fellows was a beneficiary under a treaty between the United States and the Seneca Indians of New York which acknowledged that he had acquired the Indian title as well as the original Colonial title to a specified tract, and which provided that within a specified time the Indians should be removed by the United States and the tract surrendered to Fellows. The United States did not remove the Indians within the time fixed, whereupon Fellows ejected them by force. In sustaining an action in trespass brought by an Indian against Fellows, the Court, after calling attention to the pupilage of the Indians, says:

"It is difficult to believe that it could have been intended by the Government that these people were to be left after they had parted with the title to their homes **to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of a Court of Justice.**"

This holding is based not only upon the language of the treaty, but upon "the fitness and propriety of the thing itself." (p. 372.)

If this be true where the Indians have voluntarily ceded their rights, **a fortiori,** must it be true where they have always claimed those rights and still maintain and enjoy them except in so far as they have been unable to resist the lawless violence of defendants.

The propositions stated as (b) and (c) above have been recently upheld by this court, in exact accord with the cases above cited, in Cramer v. United States, 276 Fed. 78.

Up to this point the matters advanced are recognized principles of law, established by repeated decisions of the Supreme Court. We have, therefore, demonstrated them by conclusive citations, without unnecessary discussion. They are fundamental to our case as showing the nature, dignity, incidents and obligation of the Indian title, when the Act of March 3, 1851, was passed, when Barker v. Harvey was decided, and at the present time. It will be shown to follow not only that the lower Court was wrong in its construction of said Act with reference to a title of this kind, but that the dicta in Barker v. Harvey, if found applicable to this case at all, are erroneous, as being inconsistent with and contradictory of principles embodied in a long line of decisions by the same Court.

The foregoing presentation of the Indian title, therefore, has been made at a length which might seem unnecessary had not the acceptance by the District Court of Barker v. Harvey as controlling made it necessary to prove beyond question the incidents of the title inconsistent with that decision.

5. The Act of March 3, 1851 (9 Stat. L. 631), not only does not require tribal Indians to appear before the Commission created by that Act, there to assert their right to occupancy under penalty of losing it by non-appearance, but distinctly shows a contrary intent. The affirmative action it requires is not by the Indians but by the Commission, which is instructed to investigate that right or title and given power to report thereon but not to adjudicate.

When the United States acquired California in 1848 by the Treaty of Guadalupe Hidalgo, it is a matter of common knowledge that a great number of tracts of land had already been segregated from the public domain and granted to private persons by the governments of Spain and Mexico. Many of these were of vast and indeterminate extent; few, if any, were surveyed; their limiting monuments were often difficult or impossible to identify, and a number were suspected to be fraudulent. The General Land Office map of California issued in 1913 gives a list of 553 of these grants, and William Carey Jones, the Special Commissioner appointed in 1849 by the Secretary of the Interior to investigate conditions in California, enumerates 594.

It is equally a matter of history that the aboriginal Indians were still living in large numbers everywhere throughout California on granted and ungranted land alike. Meanwhile a tide of population was rapidly occupying the new territory and it was obviously and pressingly necessary to ascertain what portion of it was private property and what was public domain to which the general system of land laws might be applied.

The difficulty in applying that system lay in the large numbers, vast acreage, unsettled boundaries, and uncertain validity of these Spanish and Mexican grants, and when Congress commenced to clear the way by the Act of 1851, the grant situation was necessarily uppermost in its mind.

"The Act of March 3, 1851, * * * contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain."

U. S. v. Morillo, 68 U. S. 707, 709.

"The Board of Commissioners was instituted by Congress to obtain a prompt decision on the validity of private land claims, to enable the government to distinguish the public land from that which had been severed from the public domain by Mexico."

U. S. v. Fossat, 61 U. S. 413, 425.

To the same effect, see:

Meader v. Norton, 78 U. S. 442, 457.
Thompson v. Farming Company, 180 U. S. 72, 77.
Botiller v. Dominguez, 130 U. S. 238, 244, 249.

Not that Congress ignored the Indian situation; in Section 16 presently to be examined it separately and specially instructed the Commission in effect to ascertain what the Indian title was and to report whether it presented any special features under the foreign laws theretofore applicable. But our point here is that whether we survey the remainder of the Act generally or examine it minutely, we find it con-

templates solely the presentation to the Commission of such formal titles as arose from or depended on **definite grants or concessions from the former governments to private persons,** effective in segregating the granted tracts from the public domain. It unmistakably does not contemplate the tribal Indian title of occupancy, which did not rest in grant and which, alike in Spanish, Mexican and United States law, attached as an easement or trust equally to granted and ungranted land until extinguished by affirmative governmental action.

(a) A general survey of the Act of 1851 as a whole is as convincing in this behalf as any argument can be.

The intention of any legislative enactment is primarily to be ascertained from a view of the statute as a whole.

Kohlsaat v. Murphy, 96 U. S. 153, 159.
Pennington v. Coxe, 2 Cranch. 33, 52.
Gayler v. Wilder, 10 How. 477, 496.
Heydenfeldt v. Mining Co., 93 U. S. 634, 638.

We respectfully request the Court to read the Act, since it is far too long for quotation here. Upon so doing, the Court's impression cannot fail to be that Congress had in mind a scrutiny of formal titles, regularly deraigned, derived from the former sovereignties, presumably to be upheld by documentary evidence, capable of culminating in a United States patent, negativing the continued existence of any governmental title and presented by claimants **sui juris,** competent to litigate cases, take notice of stat-

utes of limitation, and prosecute appeals. Clearly such titles are not the tribal Indian title of occupancy nor are these claimants the slightly civilized or totally ignorant tribes of California Indians who had just become wards of the government. In other words, when Congress says in the preamble, that the Act was "for the purpose of ascertaining and settling private land claims in the State of California," it means exactly what was then, and always has been the common meaning of "private land claims," viz., the claims of private individuals either to actual grants in fee from the former sovereignties, or to initiated but incomplete titles, capable of ripening into the fee title,—either sort involving the distinction between public and private land.

We are speaking here of the general impression produced by a perusal of the Act as a whole. This must needs speak for itself and make its own mark on the mind of the Court. Discussion on our part would be irrelevant. We confidently submit that the Court's conclusion must needs be that the claims contemplated were what are commonly called Spanish and Mexican grants and not any tribal or informal Indian title. This was all that was necessary to satisfy the recognized purpose of the legislation, to distinguish what still was public domain from what was not.

(b) A detailed examination of the Act confirms point after point the impression given by a general view.

We pass with a mere mention a slight but significant word in the title, which reads, "An Act to

Ascertain and Settle **the** Private Land Claims, in the State of California"—obviously meaning in the common use of language **the** set of private land claims that everyone knew of and was then talking about—**the** private land claims which necessitated the passing of the Act—**the** Mexican grants which rendered the limits of the public domain so uncertain.

We note but do not dwell on the fact that Section 2 requires the appointment of a Secretary, "skilled in the **Spanish** and **English** languages * * * whose duty it shall be to act as interpreter," and that Section 4 authorizes the appointment of "an agent learned in the law, and skilled in the **Spanish** and **English** languages" to collect evidence for the United States and to be present on its behalf at the taking of all depositions and testimony by claimants." Depositions were not admissible unless he had been given opportunity to attend.

Clearly it was anticipated that the commission would deal with Spanish-speaking claimants and grantees, and that Spanish was the other language besides English in which testimony was expected. Yet California was populated by thousands of Indians, speaking their various languages and occupying much of their original territory on plains and mountains. Certainly they did not all speak Spanish. If Congress intended to require all these primitive and helpless people to appear and maintain their right of occupancy, ordinary fairness would have dictated some arrangement whereby interpreters skilled in their languages could be engaged and paid

as occasion arose. Yet there is no provision in the Act for interpreters except as above cited. The natural inference is that Congress had in mind such claimants only as had become sufficiently Mexicanized to apply for and obtain land grants and whose knowledge of Spanish might reasonably be presumed.

We do not emphasize these points. They are merely straws which show the way the Congressional wind blew.

(c) Section 8, however, defines the class of persons contemplated by the Act and the nature of their land claims in plain language which **absolutely and necessarily excludes the Indians and their right or title.**

"And be it further enacted that each and every person claiming lands in California **by virtue of any right or title derived from the Spanish or Mexican government,** shall present the same to the said commissioners when sitting as a board."

Titles so derived alone are within the scope of the Act. But the Indian title was not so derived. The Act therefore did not require its presentation.

That the Indian right is original and not derived from Spain, Mexico or any sovereignty has already been briefly indicated under 1 (a) **supra.** That it is a surviving element of an original and absolute ownership of the soil prior to European conquest, or in other words an exception from the absolute domain and ownership claimed by the conquerors, and not a mere license to enjoy a possessory right granted by

the conquerors after a total obliteration of the original Indian ownership, is clear in the nature of things, was so regarded by Spain and Mexico, and has been established by decisions of our own Supreme Court.

The Indians had complete dominion and full possession when the Spaniards arrived; under the bull of Pope Alexander VI, and by right of conquest, the dominion, including the right to acquire or extinguish the possessory title, passed to Spain; but the actual possession, although impaired by **vis major,** was never entirely destroyed, and where it persisted was recognized and the right to extinguish it expressly waived by a myriad of enactments of which a few specimens have been quoted. In the case at bar the original possession of the Indian tract by the Indians remained undisturbed during the entire period of Spanish and Mexican sovereignty.

That this Indian title was recognized as original and not derivative is also seen from the language of the Spanish laws quoted under (1) **supra.** "To the Indians should be **left** their lands, cultivated ground and pastures"; the sale of land shall be so made "that the Indians shall be **left** with, above all, **what lands shall belong to them** * * *, and the waters and places of irrigation"; the lands which their industry has fertilized "**shall be reserved** in the first place and in no case can they be sold or alienated"; "that they keep them (their lands) **as they have held them previously**"; "the Indians who **possess** lands within the limits of the government **shall not in any manner be disturbed.**"

These considerations are mentioned without being stressed for the reason that the fact that the Indian possessory title is a surviving element of their original complete title is established by repeated decisions of the Supreme Court of the United States.

"The rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. **They were admitted to be the rightful occupants of the soil with a legal, as well as just claim to retain possession of it,** and to use it according to their own discretion; but their rights to complete sovereignty * * * were necessarily diminished * * *. While the different nations of Europe **respected the right of the natives as occupants,** they asserted the ultimate dominion to be in themselves."

Johnson v. McIntosh, 8 Wheat. 543, 574.

"The absolute ultimate title has been considered as acquired by discovery, **subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.**"

Ibid., p. 592.

"The Indians are acknowledged to have an unquestionable * * * right to the lands they occupy until that right shall be extinguished by a **voluntary cession** to our Government."

Cherokee Nation v. Georgia, 5 Pet. 1, 17.

"It (the principle that discovery gave title) regulated the right given by discovery among the European discoverers; but **could not affect the rights of those already in possession, either as original occupants,** or as occupants by virtue of a discovery made

before the memory of man. It gave an exclusive right to purchase, **but did not found that right on a denial of the right of the possessor to sell.**"

Worcester v. Georgia, 6 Pet. 515, 544.

"The Indian nations have always been considered as distinct, independent, political communities, **retaining their original natural rights as the undisputed possessors of the soil from time immemorial.**"

Ibid., p. 559.

Where Indians ceded certain territory to the United States, but the latter in the same transaction allowed a reservation of certain sections to designated Indians, the Court says:

"It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but **under his original title** confirmed by the Government in the act of agreeing to the reservation."

Gaines v. Nicholson, 9 How. 356, 365.

"Spain at all times, or from a very early date, **acknowledged the Indians' right of occupancy** in these lands, but at no time were they permitted to sell them without the consent of the King."

Chouteau v. Moloney, 16 How. 203, 228.

"It is a fact in the case that the Indian title to the country had not been **extinguished** by Spain, and that **Spain had not the right of occupancy.** The Indians had the right to continue it as long as they pleased."

Ibid., p. 237.

"Beyond doubt, the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the Western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory. * * * Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, **retaining their original natural rights as the undisputed possessors of the soil from time immemorial. * * * Unmistakably their title was absolute,** subject only to the pre-emption right of purchase acquired by the United States as the successor of Great Britain."

Holden v. Joy, 84 U. S. 211, 243-4.

See also

Mitchel v. United States, 9 Pet. 711, 752.
Doe v. Wilson, 64 U. S. 457, 463.
Wisconsin v. Hitchcock, 201 U. S. 202, 214.
Dick v. United States, 208 U. S. 340, 359.

The foregoing quotations may seem needlessly numerous, although it would be easy to double the number of similar passages from Supreme Court decisions and increase ten-fold those from the laws of Spain, later carried over into the laws of Mexico. The point, however, is fundamental, and it is worth while to establish it beyond a peradventure.

We do not see how anything could be clearer. Not only do the earlier sovereignties by their own laws recognize the Indian title as original and not derivative, but our Court of last resort has authori-

tatively so stated. Nor could it be otherwise, since the Indians were there when the conquerors came, and remained there continuously, still holding part of what they had held before. Their title might be, and was, **recognized or acknowledged** by the new governments, but it was **derived** from original and immemorial possession or as the Supreme Court suggests in Holden v. Joy, **supra,** from the Great Spirit.

The Mexican and Spanish grant titles were **derived** from those governments; the Indian occupancy title was not. The former, therefore, or any title emanating from those governments, had to be presented to the Commission; the Indians and their title were outside the scope of the Act.

Section 8, therefore, by itself alone, conclusively shows that Indians were not within the contemplation of Congress at all, except for the purpose later indicated in Section 16. Congress is presumed to have known the law to be as repeatedly announced by the Supreme Court, that the Indian title was not derivative. When, therefore, it required claimants under derivative titles only to present them, it definitely excepted the aboriginal title from its requirement. In Barker v. Harvey, 181 U. S. 481, 491, there is a mention of Section 8 couched in language far from clear but apparently indicating that the claim then before the Court was urged not on the basis of the aboriginal Indian title but as founded on the provision for Indian protection embodied in one of the Mexican grants involved. This will be discussed later in our analysis of the Barker case. It will be

found, however, that that opinion nowhere controverts any of the foregoing arguments nor asserts that the general Indian title, such as we primarily rely on, was derivative. It could not do so without contradicting a long line of decisions of the same Court. And if the Indian title was not derivative, it was not required to be submitted.

(d) Passing on, we note, but do not dwell on, other subordinate indications that the purpose of Congress was to deal with formal grants and not general and aboriginal titles not resting in grant nor evidenced by writings.

The same Section 8 requires the claimant to present his claim, "together with such **documentary evidence** and testimony of witnesses, as the said claimant relies on in support of such claims."

Section 9 requires that the petition of a defeated claimant on appeal "shall set forth fully the nature of the claim, and the names of the **original and present claimants,** and shall contain a **deraignment of the claimant's title,** together with a transcript of the report of the board of commissioners and of the **documentary evidence** and testimony of the witnesses on which it was founded"—with more to the like effect.

Of course, these passages by themselves are not conclusive, but they are significant and persuasive. What documentary evidence could Indians produce at the hearing and what deraignment or formal showing of their title could they make in a petition on appeal—unless, perhaps, a deraignment from the

Great Spirit, as suggested in Holden v. Joy, **supra.** How could they set forth the names of the "original claimants"—unless by identifying their ancestors born of the legendary marriage of the sun and the moon, or first created by the Manitou on the plains and hills which they had possessed ever since. No one can read these passages without concluding that Congress in enacting them, had in mind the holders of formal titles evidenced by the regular expediente —the petition to the governor, the reference of the petition for a report thereon, the report, the grant and the confirmation; and such title holders individuals, not tribes. No one can suppose that Congress, if it had intended Indians to appear before the Commission, would not have used language appropriate to include their unwritten, peculiar and non-derivative title.

(e) When we come to Section 13, we find a requirement which, like the limitation in Section 8, is **absolutely impossible of reconcilement** with the theory that the Act contemplated Indians among the proponents of claims. It reads:

"And be it further enacted that * * * for all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, **a patent shall issue to the claimant** upon his presenting to the General Land Office an authentic certificate of such confirmation."

If, as our opponents contend, the Act required all Indians to present their occupancy title for confirmation under penalty of losing it, it must have contemplated that such title might on proper showing

be upheld and confirmed like any other. Whenever, then, the occupancy title upon proof of its existence and continuity was established, under Section 13, "a patent **shall** issue to the claimant." The language is not permissive but imperative.

But who ever heard of a United States patent conveying to an Indian tribe an occupancy title? This title as already noticed [4 (a) **supra**], is in the nature of an easement or trust with which the fee title is charged, or of a possessory title held by a life tenant against the remainder man. Who ever heard of a United States patent conveying to any grantee such a title, or conveying anything but the fee title? Such fee may be held in trust or may be subject to a use or easement, but it is always the fee that is conveyed. In the case at bar, as in very many cases, Indians were in occupation of part of a grant. If they had come before the Commission and made proof of immemorial occupancy, would the General Land Office have been obliged to give a patent to them and another patent to the same land to the Mexican grantees? No conclusion can be reached under this theory which is not preposterous. The truth is that it is the theory itself that is preposterous. Abandon the astonishing and barbarous idea that Congress meant to say that child-like aborigines, **non sui juris,** incompetent to manage their own affairs, wards of the United States and under its protection, were to be charged with knowledge of the Act and its requirements, were to travel from all quarters of the State of California to San Francisco and there present evidence acceptable to a white man's court of their possessory title, under penalty of being turned

homeless and resourceless upon the world; give the act its obvious application to those who were sufficiently alert to have already obtained grants or similar rights from the former governments; and the whole measure becomes a fair, consistent and reasonable enactment. The other theory attributes to Congress the perpetration of a cynical and inhuman travesty of justice and a substantial and flagrant violation of a treaty just concluded, which at the same time was so clumsily conceived that any Indians who might chance to learn of the attempted robbery and prove their possession would receive the unheard-of grace of a United States patent for an occupancy title, fixing that title as a charge forever upon the fee, whether vested in a Mexican grantee who might also receive a patent to the same land, or whether remaining in the United States. In other words Congress was gambling on whether the Indians would or would not learn of the Act and appear before the Commission. If they did not, the guardian would succeed under form of law in cheating its helpless wards out of an ancestral right which had been solemnly pronounced as sacred as the fee simple of the whites; but if by some accident the news should spread among the Indians and the tribes should present their claims, the United States would permanently lose its otherwise acknowledged right to extinguish the Indian title over the greater part of the public lands in the whole state of California. The whole thing is absurd beyond description.

But it is a familiar principle that statutes should never be so construed as to impute absurd and irrational conclusions to the legislature.

Kohlsaat v. Murphy, 96 U. S. 153, 160.

"General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences."

U. S. v. Kirby, 7 Wall. 482, 486.
Church of Holy Trinity v. U. S., 143 U. S. 457, 459, 461.
Lau Ow Ben v. U. S., 144 U. S. 47, 59.
Hawaii v. Mankichi, 190 U. S. 197, 213.

"There are few surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule."

International Ry. Co. v. U. S. (C. C. A. 2d Ct.) 238 Fed. 317, 321.
Tsoi Sin v. U. S. (C. C. A. 9th Ct.), 116 Fed. 920, 926.

Nor should a construction be given which imputes to Congress a breach of public faith.

U. S. v. Central, etc., Co., 118 U. S. 235, 240.

The application of either or both of these rules of construction convincingly shows that Congress never intended Indian claims to be presented to the Commission.

(f) That the Act did not intend to require tribal Indians to present their occupancy title to the Commission under penalty of its extinguishment, is nowhere better shown than by Section 16, reading:

"That it shall be the duty of the Commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or

labor of any kind, and also those which are occupied or cultivated by Pueblos or Rancheros Indians."

By specifying what was expected and required as to Indian tenures this section excludes everything else.

The Tejon Indians, described as "agricultural, pastoral, sedentary and peaceful," and as "raising crops and pasturing horses, cattle and other stock * * * gathering the natural products of the soil * * * and residing in permanent dwellings," on the Indian tract (Complaint, Par. V) are within the description of Section 16; and the proof will still more clearly show that they were and are not only engaged in agriculture, but were and are "Rancheros Indians" formerly residing in numerous permanent villages or rancherias, one of which they still inhabit.

But if, as appellees' theory requires, all these Indians were obliged to present their land claims or titles to the Commission, with the result that if those claims were sustained they would be patented, and if they were rejected the land they covered would become a part of the public domain, what is the sense of directing the Commission to "ascertain and report" on their land tenure? Their rights, whatever they were, would be **adjudicated and fixed** and the decree of the Commission would be the best possible report. The absurdity would be the same as if the United States District Court, to which an appeal lay from the Commission, had been directed first to **pass on and decide** all the Spanish and Mexican land claims and then to **ascertain what they were** and

make a report on them. Once more appellees' theory comes to a ridiculous conclusion.

The fact is that Section 16 affirmatively shows that Indians were not expected to present their titles to the Commission. Here is the first mention of Indians in the Act and the first provision which is not expressly or inferentially exclusive of them. Here there is a specific statement of the power and duty of the Commission with regard to Indian titles. Up to this point in the Act, and as to all claims derived from the Spanish or Mexican governments, it is to hear and decide; now, as to Indian land tenures, it is to "ascertain and report." This definition and limitation of its duty is necessarily exclusive.

"**Expressio unius est exclusio alterius** is a universal maxim in the construction of statutes."

U. S. v. Arredondo, 6 Pet. 691, 724.

"It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, **by necessary implication prohibited their sale in any other way.**"

Smith v. Stevens, 10 Wall. 321, 326.

"When a statute limits a thing to be done in a particular mode, **it includes a negative of any other mode.**"

Raleigh, etc., Co. v. Reid, 13 Wall. 269, 270.

"This Court from its first organization until this time have held that this **enumeration of the cases in which it had appellate jurisdiction was an exclusion of all others.**"

Ex parte Craue, 5 Pet. 189, 204.

"They (the legislators) have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction and **this affirmative description has been understood to imply a negative of such appellate power as is not comprehended within it.**"

Durousseau v. U. S., 6 Cranch., 307, 314.

"* * * The general rule that the affirmative description of the cases in which the jurisdiction may be exercised **implies a negative on the exercise of such power in other cases.**"

In re Heath, 144 U. S. 92, 93.

See also:

Beley v. Naphtaly, 169 U. S. 353, 360.

Cherokee Intermarriage Case, 203 U. S. 76, 94.

Union Pacific R. R. Co. v. Snow, 231 U. S. 204, 213.

It necessarily follows not only that the Act does not require the presentation of Indian titles, but that, under a universal maxim of statutory construction, by giving the commission definite powers and duties as to Indians and their titles, it excludes from its jurisdiction all other powers, and among them that of adjudication upon these titles. Indian rights, whatever they were, were to be considered apart from the discrimination between valid grants and ungranted public land to make which was the main duty of the Board.

It must not be forgotten that such was the opinion of the Commission itself in this very case where, after referring to the mention in the grant of the

Indian possessory title, it says: "This, however, is a question cognizable before another tribunal." (Transcript, p. 12.)

There is a reference to this section in Barker v. Harvey, 181 U. S. 481, 492, but it contains nothing opposed to the foregoing and indeed makes clear that the above considerations were not presented to the court in that case.

(g) Bearing in mind on the one hand that the purpose of the Act was to segregate private lands from public domain, and on the other that the Indian title is an easement, use or trust and not the fee title [4 (a) **supra**], it is clear that in every case the necessary controversy must be between the fee claimant and the United States. The Supreme Court pursuing this fact to its logical conclusion has specifically held it **improper for the holders of titles subordinate to the fee to present their claims to the Commission.**

In U. S. v. Fossat, 61 U. S. 413, "private and adversary" contestants of the grantee's title opposed confirmation in the name of the United States. The court says (p. 424)

"It is the opinion of the Court that the **intervention of adversary claimants in the suit of a petitioner under the Act of March 3d, 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged.** The Board of Commissioners was instituted by Congress to * * * enable the government to distinguish the public land from that which had been severed from the public domain by Mexico."

The Court then describes the scheme of procedure, mentions the fact that the patent does not affect third persons, and concludes

"The language and policy of these enactments **limit a controversy like the present to the United States and the claimant.**"

Since the Indian title is in the nature of an easement, use or trust with which the fee title is charged, it will be seen that the same thing is in effect held in Townsend v. Greeley, 72 U. S. 326, 335, where the Court says:

"Whether the legal title thus secured to the patentee was to be held by him charged with any trust **was not a matter upon which either board or court was called to pass.** If the claim was held subject to any trust before presentation to the board the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but **it does not determine the equitable relations between him and third parties.**"

Such also was the direct decision of the Board itself as to the fee title now in controversy when it said that "this (the question of the Indian use) is cognizable before another tribunal."

To the same general effect see:

U. S. v. Morillo, 68 U. S. 706, 709.
Meader v. Norton, 78 U. S. 442, 457-8.
Carpentier v. Montgomery, 80 U. S. 480, 495.

Botiller v. Dominguez, 130 U. S. 238, 249.
Monroe Cattle Company v. Becker, 147 U. S. 47, 57.

We submit that the foregoing examination of the Act conclusively demonstrates both affirmatively and negatively that Indians were not required to present their tribal title to the Board. Appellees' case, therefore, necessarily collapses.

6. **The provision of Section 13 that lands, the claims to which were rejected, or not presented within two years, "shall be deemed, held and considered as part of the public domain of the United States," offers no obstacle whatever to our contention that the Act did not require tribal Indians to present their claims to the Board.**

There are, so far as we know, only two arguments derived from the Act and relied upon by our opponents as upholding their theory that tribal Indians must present or lose their claims. One is that "public domain" is the same as "public lands"; that lands encumbered with the Indian easement or use cannot be treated or considered as "public lands" in the ordinary sense; and that, therefore, when Section 13 made lands to which claims had not been presented part of the public domain, it intended to extinguish the Indian title wherever unpresented.

The other is that when Section 15 provides that decrees and patents alike "shall be conclusive between the United States and the said claimants only and shall not affect the interests of **third persons,**" the last two words do not mean what they say, but

denote some special and restricted class among whom Indians are not included.

Both arguments, so far as we know, are derived solely from Barker v. Harvey, 181 U. S. 481.

Taking up the first, we notice that while it would have been perfectly easy for Congress, if so minded, to have said that unclaimed land should become part of the "public lands of the United States" it did not in fact do so. It said "public domain."

Now, while it is true that these expressions are sometimes loosely used as equivalent, it is perfectly obvious that they are not in fact synonymous. A national park, or a forest reserve, or an Indian reservation is certainly part of the public domain, and as certainly not a part of the "public lands of the United States" in the sense of lands subject to sale or disposal under general laws. The ground occupied by lighthouses, post offices, coast defenses, national cemeteries, military camps and the like is certainly public domain. But it is not public land of the United States in the technical sense.

Therefore, when Barker v. Harvey makes the sweeping statement—

> " 'Public domain' is equivalent to 'public lands' and * * * the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws" (p. 490),

its dictum, whether tested by obvious facts or by other decisions of the same court, is hasty and incorrect. Congress chose to use the wider expression

"public domain," which would include all lands, the underlying fee title to which is in the United States. What possible justification is there for stating that it did not mean what it plainly said? In view of all the other reasons against the inclusion of Indians within the requirements of the Act, it is consistent to conclude that Congress purposely and not negligently or accidentally used the wide words and not the words which had received a narrow and limited construction, in order to show by one more indication that the Indian title was to remain unaffected by the Act.

What is really meant by "public domain" is seen in Missionary Society v. Dalles, 107 U. S. 336, where the Court, referring to the Act of 1848, organizing the Territory of Oregon, said:

"The **public domain** included within the Territory of Oregon by the Act just mentioned, had not then been surveyed, nor was it open to settlement, pre-emption or entry. * * * The title was in the United States **subject to the possessory Indian title to portions of the Territory.**" (p. 344.)

This was exactly the situation in California at the time of the Act of 1851. There had been no surveys, and the public land laws were not applied to the State until March 3, 1853 (10 Stat. L. 244). To public lands of that status the Supreme Court applies with precision the term "public domain," by which Congress in the Act of 1851, with equal precision, described lands unclaimed, or the claims to which had been rejected by the Commission. In both cases "the title was in the United States **subject to**

the possessory Indian title to portions of the territory."

To the same effect are:

Buttz v. Northern Pacific Ry., 119 U. S. 55, 70.

St. Paul, etc., Ry. Co. v. Phelps, 137 U. S. 528, 541-2.

But while the use of "public domain" instead of "public lands" in the ordinary use of language makes it clearer that the unclaimed land fell into a classification to which the Indian title might, and commonly did, attach, yet we have no need to stress the words unduly. The same result would be reached even if Congress had said "public lands of the United States," **since land may be, and often has been, treated as public land of the United States, although admittedly subject to the Indian title of occupancy and possession.**

Note first that "public lands" does not always or necessarily have the limited, technical meaning emphasized in Barker v. Harvey as though it were the only meaning. In construing an act granting a right of way through the "public lands," the Supreme Court, in a much more recent case than Barker v. Harvey, says:

"But it is said that the right of way section was inapplicable because it was confined to 'public lands,' a term used to designate such lands as are subject to sale or other disposal under general laws. **No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense.** We think that is the case here, first, because the provision in the same

section that the United States should extingnish as rapidly as might be **the Indian title to all lands required for the right of way implies that Indian lands as to which Congress properly could grant a right of way were intended to be included.**"

Kindred v. U. P. R. R. Co., 225 U. S. 582, 596.

Here then, lands in the possession of Indians might be none the less "public lands" and the United States might grant them and extinguish the Indian title later. The Barker v. Harvey statement is in effect overruled.

In like manner, this Court in U. S. v. Blendaur, 128 Fed. 910, 913, says:

"The contention of appellee that they were not public lands because these words indicate only such lands belonging to the United States, 'as are subject to sale or other disposition under general laws' (citing Barker v. Harvey and other cases) cannot be sustained. The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used and it is the duty of the Court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results."

Barker v. Harvey (p. 491) presses this point to the extent of saying:

"It could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States."

And again:

"Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing confirmation of that claim if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy." (p. 492.)

Now, whatever may have been claimed in Barker v. Harvey, we do not claim in the case at bar an inextinguishable right of Indian occupancy. We know of no such right. We do claim, however, a right of occupancy **inextinguishable except by the government.** We do not contend that the requirement in the Mexican grant of non-interference with the Indians **by the grantees** made the Indian right absolute and perpetual **as against the government.** We claim for this title the status of a tribal Indian title resting primarily on the general right of occupancy and fortified by a recognition of it in the grant as an existing right, with a prohibition against interference with it **by the grantees,** thus making clear the fact that in granting the fee Mexico did not intend to extinguish the Indian title. We do not at all argue that the Mexican government prior to 1846, or the United States government afterwards, could not have extinguished it. We do argue, however, that only the government had the power to do so; that the grantees and their successors had no such power and that the Indian title is permanent **until the government sees fit to act.**

The opinion in Barker v. Harvey is in some respects elusive and hard to understand. If, however,

it means that the claim there was for a perpetual Indian right beyond the power even of the government to extinguish, that fact alone distinguishes it so radically from the case at bar as to make it worthless as an authority against us. This will be more fully discussed in its proper place.

Returning to our present topic, however, lands subject to the ordinary Indian title above described and here claimed, have over and over again been treated as public lands both of Mexico and the United States and have been granted subject to that title. This is demonstrated by the cases already cited under 4 (b) **supra.** They may not have been so granted under general laws, but as we have just seen "public lands" does not necessarily mean lands grantable under general laws—still less does "public domain." If Barker v. Harvey contradicts this, it is a reed broken by a ponderous weight of authority emanating both earlier and later from the same court.

7. Section 15 reading—

"That the final **decrees** rendered by the said Commission or by the District or Supreme Court of the United States, or **any patent** to be issued under this act **shall be conclusive between the United States and the said claimants only, and shall not affect the interest of third persons,"**

in plain and simple language preserves the Indian title under decree and patent alike until the government itself affirmatively acts to extinguish it.

In the first place we note that the Commission itself so held in this very case. Referring to the protective provision in the grant it says:

"This restriction we have heretofore decided, **does not affect the right of property,** though it may create a use in favor of Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal." (Transcript, page 12.)

The recognition in the grant of the Indian title is thus declared to be consistent with and unaffected by the passing of the fee. The Indian use or easement is left to the protection of a court of equity if ever it were questioned or interfered with. The commission, therefore, deciding that its function was solely to determine whether the fee was in public or private ownership, declared that it had no jurisdiction to pass on the Indian title. Its decision containing this passage was affirmed by the District Court and an appeal was dismissed by the Supreme Court. (Transcript, p. 12.) Yet, if appellees' position is correct, this refusal to take jurisdiction was error and the case should have been reversed. The Supreme Court, however, thought otherwise. We submit that the announced lack of jurisdiction of the Commission in this particular thus became the law of the case; that it constitutes **res judicata**; that the trial court here in taking a contrary position in effect overruled the Supreme Court; and that its judgment should now be reversed on this ground alone.

But we do not need to rest on this. We confidently submit that Barker v. Harvey is demonstrably wrong if it says that the Indians here concerned may not take advantage of the provision that decrees and

patents shall not affect third persons. Let us see what it actually does say. It quotes from Beard v. Federy, 3 Wall. 478, 492:

"The term 'third persons' as there used does not embrace all persons other than the United States and the claimants, but only those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property."

It then continues:

"If these Indians had any claims **founded on the action of the Mexican Government** they abandoned them by not presenting them to the Commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property.'" (p. 491.)

The words we have underlined suggest a contention that a provision for non-interference with Indians, found in one of the two Mexican grants there involved (although not in the one confirmed) was urged as constituting "action of the Mexican government." If so, Barker v. Harvey is again distinguishable, since our claim here is that the non-interference condition in the grant was simply a recognition of the pre-existing Indian right, showing by way of precaution that the government was informed of the presence of Indians on the granted land and did not intend any interference with their possessory title by granting the fee.

This, however, will be discussed later.

Reverting to our present question, whether or not the Indians, with their possessory title, are such "third persons" as to be outside the scope of the decrees and patents, we call attention, secondly, to the general principle that a patent or any other grant does not cut off the rights of third persons by implication.

"Thus, a grant, even by act of parliament, which conveys a title good against the King, **takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land.**"

U. S. v. Arredondo, 6 Pet. 691, 738.
U. S. v. Fernandez, 10 Pet. 303, 305.

Much more must this be true where, as here, the patent does contain a saving clause. (Transcript, p. 13.)

"Grants of the strongest sort * * * do not extent beyond the meaning and intent expressed in them, **nor, by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant.**" (Arredondo Case, p. 739.)

Only by a strained construction could the Indians be excluded from the term "third persons."

Next, the United States patent issued on confirmation of a grant was a quit claim or at best a confirmation, and added no new qualities to the patentee's title.

"When, therefore, guided by the action of the tribunal established to pass on the validity of these

alleged grants, the government issued a patent, it was in the nature of a quit-claim, an admission that the rightful ownership had never been in the United States but had passed at the time of the cession to the claimant. * * * Such a patent was, therefore, conclusive evidence **only as between the United States and the grantee** that the latter had established the validity of the grant."

Adam v. Norris, 103 U. S. 591, 593.

Referring to this passage, the same court later says:

"It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a quit claim."

And again:

"These alleged rights and limitations arise under the Act of March 3, 1851, which this court has repeatedly held **did not originate Federal rights or titles, but merely confirmed the old.**"

Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 227, 233.

This last opinion refers to and is based on Boquillas, etc., Co. v. Curtis, 213 U. S. 339, 344, where the Court says:

"The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, **but releases that of the United States;** Beard v. Federy, 3 Wall. 478, 491; and that by the grant from the United States, it gained rights as a riparian proprietor that cannot be displaced by a subsequent attempt

to appropriate the water. * * * But while it is true that in Beard v. Federy, **supra,** Mr. Justice Field calls such a patent a quit claim, we think it rather should be described as a confirmation **in a strict sense.** 'Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid; so that the confirmation doth not regularly create an estate.' * * * **It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant,"**
with much more to the same effect, noting also that something might be urged to the contrary, but concluding:

"But we are satisfied that the true intent of the statute and the reason of the thing are as we have said."

This deliberate pronouncement not only corrects Beard v. Federy and shows that the confirmee took no more by the patent than the Mexican grant gave him, viz.: in this case the fee, subject to the Indian use which that grant expressly reserved, but it is highly confirmatory of our immediate contention that the Indians are "third persons" under Section 15.

To the same effect is:

Wilson Cypress Co. v. Del Pozo, 236 U. S. 635, 649.

Finally, the definition of "third persons" in Beard v. Federy, cannot be and was not intended to

be exclusive, and the Indian title being such as heretofore described, is exactly the sort of interest which Section 15 was intended to preserve.

In Beard v. Federy, 70 U. S. 478, a claim of the Bishop of Monterey as a corporation sole to 19 acres of church land, was confirmed by the commission and a patent issued. Later his grantee brought ejectment against one who occupied under a subsequent and unrecorded Mexican grant, made a few days before the end of Mexican sovereignty, unapproved by the Departmental Assembly and which had never been presented to the commission for confirmation, and was therefore void for the two reasons last mentioned. The defendant contended that he was a "third person" under Section 15; that as against him the patent was not evidence for any purpose and that the whole question as between the Bishop's title and the governor's grant remained open as though no proceedings before the commission had ever been had. The Court with unquestionable accuracy held that the United States patent showed that the Bishop's claim was valid under the law of Mexico; might have been located under the former government and was correctly located now; and that it was conclusive not only against the government, but "against parties claiming **under the government by title subsequent**"—in other words, such parties as the defendant. **With reference, therefore, to the facts before it,** the Court stated that "third persons" meant "those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property"; in other words, the only persons who could come into court and **at-**

tack the patent or maintain that "the whole subject of titles is open precisely as though no proceedings for the confirmation had ever been had and no patent for the land had been issued" (p. 491) are those who could show another patent issued upon a confirmed grant, or some title of equal dignity which could have been set up against the Mexican or American government itself, when the one made the grant or the other issued its patent.

In the instant case, of course, we make no attack whatever upon the patent. We merely contend that when it was made a small portion of the land it covered was and still is subject to a recognized Indian title. We are merely asserting that the fee to that part passed subject to an Indian easement or use as it has repeatedly passed in other cases. Beard v. Federy, therefore, presents no similarity to the facts here involved.

It is too clear for argument that when Congress said that decrees and patents "should not affect the interests of third persons" they did not mean **only** such third persons as are described in Beard v. Federy. Suppose the Mexican grantee had given a lease which was outstanding when he presented his grant and received his patent. Would anyone doubt that the lease remained valid unaffected by the confirmation or patent? Suppose that in the devolution of the granted title under Mexico the fee had become subject to a life estate in XY. Would anyone suppose that a confirmation and patent to AB would extinguish the life estate? Suppose that the fee was

subject to an easement of right of way. Could anyone conceive that the confirmee would take title discharged of that easement?

In other words, the term "third persons" necessarily has a general signification outside of the restricted application required by the narrow and unusual facts of Beard v. Federy. It necessarily includes exactly the sort of persons of whom the tribal Indians are examples. This view is confirmed by repeated decisions of the Supreme Court:

"Whether the legal title thus secured to the patentee was to be held by him **charged with any trust was not a matter upon which either board or court was called to pass.** If the claim was held subject to any trust before presentation to the board, **that trust was not discharged by the confirmation and subsequent patent.** The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it **does not determine the equitable relations between him and third parties.** * * * If the trust was not stated and did not appear, the legal title was none the less subject to the same trust in the hands of the claimant."

Townsend v. Greeley, 72 U. S. 326, 335.

In another case the commission had confirmed a forged grant and patent had issued upon the confirmation. The genuine grantees also had separately presented their claim to the commission, which rejected it, misled by the forged evidence which caused the confirmation to the pretended grantee. Later the genuine grantee brought suit to have the fee title in

the hands of the fraudulent grantee impressed with a trust; which was done. The court says:

"It is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants."

After agreeing with the general principle that the decision of a tribunal with jurisdiction is usually conclusive and that even fraud does not always open such decision, the Court continues:

"But it is not important to enter much into that field of inquiry, as the fifteenth section of the Act under which the commissioners were appointed, provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States, or any patent to be issued under the Act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons. **Nothing more is contemplated by the proceedings under that Act than the separation of the lands which were owned by individuals from the public domain**"—

with much more to the same effect:

Meader v. Norton, 78 U. S. 442, 457.

Again we note:

"It is true that the 15th section of the Act declares that the decree of confirmation shall be conclusive between the United States and the claimants only and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceedings who

might have Spanish or Mexican claims independent of or superior to that presented by claimant, **or the equitable rights of other parties having rightful claims under the title confirmed. * * * The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off.** Their equities were reserved. But they must seek them in a proceeding appropriate to their nature and condition."

Drawing a parallel between the situation before it and a patent granted to a pre-emption claimant, the Court continues:

"Whilst the patent in that case confers the legal title and admits of no averments to the contrary, the patentee **may be subject in equity to any just claim of a third party even to the extent of holding the title to his sole use.**"

Carpentier v. Montgomery, 80 U. S. 480, 495-7.

The Court in this opinion refers to Beard v. Federy, **supra,** and evidently had in mind to correct any misapprehension that might arise from the narrow application given to "third persons" in that case.

In this connection we invite the attention of the Court to the relevancy of the cases cited under 4 (b) and 4 (c) **supra.** It was there established by Supreme Court decisions, first, that the Indian title is not extinguished by a mere grant in fee by the government; second, that it is extinguished only by words or acts affirmatively showing such intent; and

third, that throughout the history of this government, and its predecessors, it has never been extinguished without compensation. Each one of these principles confirms the provision that Indians are among the "third persons" whose right was to remain undisturbed by decrees or patents.

We respectfully request the Court to glance again at these cases. Their cumulative effect is overwhelming.

We submit that the foregoing considerations and decisions dispose of the contention that Indians are not "third persons" under Section 15, and affirmatively show that they come directly within the protection of the Act in that regard.

8. Familiar principles of statutory construction not only support but require the interpretation of the Act for which we contend.

We do not concede that there is any necessity to invoke technical rules of construction here. Nothing more is needed than to read the Act as a whole, giving its language the ordinary meaning throughout and specially noting the features above referred to merely because they are those particularly relevant to our situation. But if any passages seem to the Court ambiguous, there are four recognized rules, any one of which must turn the scale in favor of Indian rights.

(a) In view of the ignorant, dependent and helpless state of the Indians and the assumption of the government toward them of the high obligation of guardian to ward, statutes and treaties are invari-

ably construed liberally in their favor. This principle has prevailed throughout the entire history of this country and is stated and applied in innumerable decisions of the Federal Courts. The following excerpts are specimens of a great number.

"As often affirmed in the decisions of this Court, the Indians are in a certain sense the wards of the United States and **the legislation of Congress is to be interpreted as intended for their benefit.**"

Marks v. U. S., 161 U. S. 297, 303.

"The settled rule that as between whites and Indians the laws are to be construed most favorably to the latter."

Cherokee Intermarriage Case, 203 U. S. 76, 94.

"But in the government's dealings with the Indians, the rule is exactly to the contrary (of strict construction). The construction instead of strict is liberal. Doubtful expressions instead of being resolved in favor of the United States are to be resolved in favor of the weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized **without exception** for more than 100 years."

Choate v. Trapp, 224 U. S. 665, 675.

To the same effect see:

Fellows v. Blacksmith, 60 U. S. 366.
U. S. v. Kagama, 118 U. S. 375.
Choctaw Nation v. U. S., 119 U. S. 1, 28.
Cherokee Nation v. Ry. Co., 135 U. S. 641, 652.

Frost v. Weenie, 157 U. S. 46.
Jones v. Meehan, 175 U. S. 1.
U. S. v. Rickert, 188 U. S. 432.
U. S. v. Wynans, 198 U. S. 371.
Winters v. U. S., 207 U. S. 564.
U. S. v. Celestine, 215 U. S. 278.
Tiger v. Investment Co., 221 U. S. 286.
Northern Pacic Ry. v. U. S., 227 U. S. 355, 366.
U. S. v. Pelican, 232 U. S. 442.
U. S. v. Nice, 241 U. S. 591.
Alaska, etc., Co. v. U S., 248 U. S. 78.
Seufert Bros. v. U. S., 249 U. S. 194.

Barker v. Harvey, 181 U. S. 481, 492, admits the existence of this principle, saying, "this court has uniformly construed all legislation in the light of this recognized obligation," but continues:

"But the obligation is one which rests upon the political department of the government, and this court has never assumed in the absence of congressional action to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians."

This is one of the passages in the decision upon which, to use the language of Lord Eldon, "the mind of man doth not readily fasten." The obligation to resolve doubts in favor of Indians was, under a long line of decisions of the same court, as well settled as the obligation of Congress to legislate with an eye to

their helplessness and dependency. What reason or excuse was there for evading it in that single instance? "Congressional action" in the shape of the Act of 1851 was before the court. Why not construe it as "this Court has uniformly construed all legislation, in the light of this recognized obligation?" What bearing had the absence of "legislation by Congress having special reference to these particular Indians," upon the duty of the Court to follow its own established rule in construing the piece of legislation then under discussion?

We hope the court may be more successful than we have been in finding answers to these questions; but in any event, it is clear that Barker v. Harvey admits the principle of liberal construction in favor of Indians, which the same court in a much later case has stated to be "without exception"; and shows no satisfactory reason for departing from it in the case then before the court.

(b) The second rule of construction, equally arising from the peculiar position of Indians in this country, is that general acts of Congress do not apply to them at all unless so worded as clearly to manifest an intention to include them.

"General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them. Constitution Art. I, Sec. 2, 8; Art. 2, Sec. 2; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; U. S. v. Rogers, 4 How. 567; U. S. v. Holliday, 3 Wall. 407; Case of the Kansas Indians, 5 Wall. 737; Case of New York Indians, 5 Wall. 761; Case of the Chero-

kee Tobacco, 11 Wall. 616; U. S. v. Whiskey, 93 U. S. 188; Pennock v. Commissioners, 103 U. S. 44; Crow Dog's Case, 109 U. S. 556; Goodell v. Jackson, 20 Johns, 693; Hastings v. Farmer, 4 N. Y. 293."

Elk v. Wilkins, 112 U. S. 94, 100.

Similarly where Congress had made to a railroad company a general grant of alternate sections of land some of which fell within a tract in Indian possession, the court, in deciding that the Act did not apply to the latter, said:

"We are not without authority that the general words of this grant did not include an Indian reservation (citing and discussing cases). * * * "Congress cannot be supposed to grant them (Indian reservations) by a subsequent law general in its terms. **Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.**"

Leavenworth, etc., R. R. v. U. S., 92 U. S. 733, 745.

See also U. S. v. Nice, 241 U. S. 591, 600.

This rule is an obvious outcome of the peculiar relations of Indians to the government and the unusual nature of their land tenure. Since their status is exceptional, it is not considered to be covered by general language of statutes in the absence of an unmistakable showing of intent.

As already said, we see no need to resort to rules of construction, but if there is such need, here is the rule. Its application once again relieves Indians from the unjust and unprecedented obligations and disadvantages thrust upon them under appellees' theory.

(c) In Par. 2 of our main argument we have shown the ample guaranty given by the United States in the treaty of 1848 that it would respect all property rights in the ceded territory, including those of Indians.

Appellees' theory is that by the Act of 1851 the government under form of law, in effect falsified its pledge by making the preservation of the Indian title conditional upon wild savages, or at best semi-civilized children, becoming aware of the proceedings of Congress at Washington; and thereupon within a limited time convening from distances of hundreds of miles, through wild and unsettled country, extensively occupied by suspicious or warring tribes, at San Francisco, and there appearing unaided before a white man's court, and making formal proof in a foreign language according to a prescribed procedure. This is, indeed, 'to keep the word of promise to the ear and break it to the hope.'' It makes Congress cloak the purposeful confiscation of a title it had undertaken to preserve, by means of a dishonorable subterfuge.

But a third principle forbids such conclusion. Statutes must not be so construed as to accuse the United States of bad faith.

''As the transfer of any part of an Indian reservation secured by treaty would also involve a **gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.''**

Leavenworth, etc., R. R. v. U. S., 92 U. S. 733, 742.

"General terms should be so limited in their application as not to lead to **injustice, oppression** or an absurd consequence."

U. S. v. Kirby, 7 Wall. 482, 486.

Quoting with approval an English case, the Supreme Court says:

"If there are no means of avoiding such an interpretation of the statute (as will amount to a great hardship) a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge **ought to struggle with all the intellect that he has and with all the vigor of mind that he has against such an interpretation of an Act of Parliament;** and unless he is forced to come to a contrary conclusion he **ought to assume that it is impossible that the legislature could have so intended.**"

Hawaii v. Mankichi, 190 U. S. 197, 214.

To the same effect see:

Frost v. Wenie, 157 U. S. 46, 59.
Richardson v. Ainsa, 218 U. S. 289, 298.
Missouri, etc., Ry. v. U. S., 235 U. S. 37, 41.

Comment and further citations are unnecessary.

(d) The fourth rule has been fully discussed already under 4 (c) of our main argument, where it was proven by Supreme Court decisions that throughout American history the Indian title has never been abrogated inferentially or without compensation. Our construction of the Act of 1851 is consistent with these established principles; appellees' construction is incompatible with them.

9. Contemporaneous legislation both of the United States and the State of California and subsequent legislation of the United States are in line with our construction of the Act of 1851, and show that both nation and state regarded the Indian possession as an admitted right which not only was not to be inferentially extinguished, but was to be affirmatively protected.

As an aid to ascertain whether or not Congress by the Act of 1851 had the purpose, elsewhere unknown in American history, to compel tribal Indians to come into court and prove their title or lose it, it is instructive to note contemporaneous and subsequent legislation relating to California Indians.

(a) The Indian Appropriation Act of September 30, 1850 (9 Stat. L. 558), reads:

"To enable the President to hold treaties with the various Indian tribes in the State of California, $25,000."

The Deficiency Appropriation Act of February 27, 1851 (9 Stat. L. 572), provides:

"For expenses of holding treaties with various tribes of Indians in California, in addition to the appropriation of the 30th of September, 1850, $25,000."

Here we see that four days before the Act of March 3, 1851, was passed, the same Congress was providing for the regular procedure followed for nearly a hundred years in the history of this country. Recognizing in the California Indians the same possessory right as that of Indians elsewhere it contemplated treaties whereby the Indians would relin-

quish title to a portion of their territory in consideration either of money payments, or the protection and confirmation of their title to other lands, or both.

It is impossible to suppose that the simultaneous intent of Congress was to impose upon these Indians a requirement which would inevitably extinguish almost every Indian title in California without reservation or compensation of any kind.

(b) The Act of March 3, 1853 (10 Stat. L. 244, 246-7), "introducing the land system into California" (Newhall v. Sanger, 92 U. S. 761, 765) is another clear indication of Congressional intent to respect the Indian title. By this time the two years allowed for presenting claims under the Act of 1851 had expired, private holdings had been segregated or were in process of segregation from the public domain, and if appellees' theory were correct, the occupancy right of practically every Indian in California had lapsed through inaction. Yet, Congress in providing for the survey of public lands and for the grant of pre-emption rights therein not only excepted from pre-emption "lands claimed under any foreign grant or title," but expressly said "that this Act shall not be construed to authorize any settlement to be made on any tract of land **in the occupation or possession of any Indian tribe or to grant any pre-emption right to the same.**"

Indians living on private grants retained, of course, their original rights under Mexican law, and by this Act those living on the public domain were to be protected in their similar title of occupancy. The Court will note that this Act abso-

lutely contradicts not only the idea that Indians must claim their rights or lose them, but also the dictum of Barker v. Harvey, that lands encumbered with the Indian title cannot be dealt with as public domain.

(c) On April 22, 1850, the legislature of California passed a law entitled, "An Act for the Government and Protection of the Indians." Section 2 reads as follows:

"Persons and proprietors of lands on which Indians are residing, **shall permit such Indians peaceably to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and families**; provided the white person or proprietor in possession of such lands may apply to a Justice of the Peace in the township where the Indians reside to set off to such Indians a certain amount of land, and on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, **including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians nor shall they be forced to abandon their home or villages where they have resided for a number of years**; and either party feeling themselves aggrieved can appeal to the County Court from the decision of the Justice; and then divided, a record shall be made of the lands so set off in the court so dividing them, and the Indians shall be permitted to remain thereon until otherwise provided for."

The remainder of the Act contains a number of provisions relating to offenses by or against Indians. Some of these were amended by the Statutes of 1855,

page 179; 1860, p. 196, and 1863, pp. 743-745; but none of these amendments affected Section 2, nor has it or the Act ever been expressly repealed. We believe it to be still in force, as Congress in 1891 held it to be, and if so, appellees by the conduct described in the complaint have violated it long and repeatedly and our cause of action against them might be supported on this ground alone. However, our present purpose is to indicate by comparison with other congressional legislation the meaning of the Act of 1851 as to Indian titles, and therefore, without further comment along the above line, we turn to the Act of Congress of January 12, 1891, 26 Stat. L. 712, entitled: "An Act for the Relief of the Mission Indians in the State of California," which refers to the above Act. (The Court will recall that the Tejon Indians are Mission Indians.)

Section 2 of this Act provides for the selection of reservations for each band or village of Mission Indians.

"which reservations shall include, as far as practicable, the lands and villages which have been in the actual occupation of the Indians." Also: "In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed."

The passage first quoted, permanently preserves, as far as possible, the identical and immemorial In-

dian occupancy; the second makes preliminary arrangments looking to the extinguishment of the occupancy title of Indians living on grants, but requires the ascertainment and delimitation of their actual possession. The clear inference is that up to 1891 Indian occupancy titles on grants were still recognized to exist.

The whole Act, which is too long for extended discussion here, is of a tentative nature, indicating the knowledge of Congress that the contemplated removal of the Indians from grants to vacant public land might not always be practicable and that the creation of reservations involved difficulties.

And therefore in Section 6, Congress provides:

"That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican government, and in an Act for the government and protection of Indians passed by the legislature of the State of California April 22, 1850, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands."

Three sorts of Indian rights are here contem-

plated; those secured by the Mexican grant; those set forth in the California Act of 1850; and those rights either legal or equitable arising under the general law of the United States or Mexico and enforcible by suit. Our case falls under all three.

Congress when it passed Section 6, knew of its own Act of 1851; it knew that no tribal Indian claim whatever and hardly any sort of Indian claim had been presented under it; yet it recognizes all these classes of rights as still existing and valid, and affirmatively demands their protection and enforcement. The conclusion that it had never intended to extinguish them is inevitable.

It is hardly necessary to quote authorities as to the relevancy of the several acts above cited.

"The correct rule of interpretation is that if divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them and it is an established rule of law that all acts **in pari materia** are to be taken together as though they were one law. * * * If it can be gathered from a subsequent statute **in pari materia what meaning the legislature attached to the words of a former statute,** they will amount to a legislative declaration of its meaning and as governing the construction of the first statute."

U. S. v. Freeman, 3 How. 556, 564.

"These several Acts of Congress dealing as they do with the same subject matter should be considered not only as expressing the intention of Congress at the dates the several Acts were passed, but the

later acts should also be regarded as **legislative interpretations of the prior ones.**"

Cope v. Cope, 137 U. S. 682, 688.
Tiger v. Investment Co., 221 U. S. 286, 309.
Stockdale v. Ins. Co., 87 U. S. 323, 331.
Bowling v. U. S., 233 U. S. 528, 535.

10. The Act of March 3, 1891 (26 Stat. L. 854), establishing the Court of Private Land Claims to settle Spanish and Mexican titles in New Mexico, Arizona, Utah, Nevada, Colorado and Wyoming, also sheds light on the meaning and purpose of the Act of 1851.

There are differences in its scope and details. But remembering that it was passed by the same Congress and at the same session as the Act of January 12, 1891, just discussed, and that it dealt with the same sort of situation as the Act of 1851, its expression of policy is significant. It is far too long for complete analysis and we will merely touch on a few of its most relevant provisions.

Section 6 defines the claims to be adjudicated as those arising, "by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession," and requires the petition to set forth not only the nature of the claim and the "date and form of the grant, concession, warrant or survey," but also "the names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner."

This shows that formal or record titles only were

in contemplation, and also that possessory rights were not to be ignored but were to be shown to the court **not by the possessor, but by the grant claimant.**

Sections 6 and 8 make clear that so far as this Act is concerned, Congress rejected the doctrine of Botiller v. Dominguez, 130 U. S. 238, that holders of all Mexican titles must present them for adjudication even though they were complete and perfect, and Section 8 states that confirmation shall be

"always subject to and not to affect any conflicting private interests, rights or claims held or claimed adversely to any such claim or title or adversely to the holder of any such claim or title."

The saving of rights of third persons other than the grantees and the United States is very sweeping. Equally so is another passage in Section 8:

"And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons in respect of any such lands shall be in any manner affected thereby."

Section 13 confines confirmation to claims "upon a title **lawfully and legally derived**" from Spain, Mexico, or a Mexican state, and provides:

"Second: No claim shall be allowed that shall **interfere with or overthrow any just and unextinguished Indian title or right to any land or place.**"

Its fifth and sixth subdivisions again exclude:

"The private right of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this Act had not been passed," and denies that confirmation shall operate otherwise

"than as a release by the United States of its right or title to the land confirmed."

Now the vast mass of the land affected by this Act was acquired under the treaty of Guadalupe Hidalgo, just as California had been. Spanish and Mexican grants of the same sort as those coming under the Act of 1851, but lying in other states and territories, were now to be passed on. Indians were living on many of these grants under their original possessory title just as they were in California. They had no different or higher right than had the California Indians nor were they entitled to more favored treatment. Yet, it is clear beyond peradventure that they were not expected to present their titles to the Court of Private Land Claims; that confirmation of a grant had no effect upon the Indian title or any other title attached to or encumbering the fee; and that no claim was to be allowed that so much as interfered with, much less that overthrew, any existing Indian right.

We must either conclude that the Act of 1851 was a startling and anomalous departure from the uniform trend of statutory consideration for Indians and an inexplicable and underhand attack on rights recognized before and since without exception by every department of the government—that Congress at that time was as active to disinherit the harmless

and peaceful Tejons and other Mission Indians as it was later to protect the ferocious Apache or the troublesome Navajo or Ute—or else we must decide that the Act of March 3, 1891, was a legislative construction so far as Indians were concerned of the Act of 1851, and a restatement of the same principles that the earlier Act had more concisely embodied.

The Acts of 1850 and 1853, contemporaneous with the Act of 1851, and the Act of January 12, 1891, contemporaneous with the Act under discussion, are decisive in favor of the latter view.

11. Barker v. Harvey is not parallel or controlling here.

We respectfully submit that appellant's position has been conclusively established. Appellees' sole reliance to the contrary so far as yet disclosed is Barker v. Harvey, 181 U. S. 481. That case has already been sufficiently examined to show that some of its theories of law, set forth by way of preamble to a decision on the facts, are demonstrably wrong. We do not say this presumptuously, because the test is not any reasoning or opinion of our own, but an imposing array of earlier and later decisions by the same eminent tribunal. Recognizing, however, that if that case were on all fours with the case at bar, this court might, however reluctantly, think itself bound thereby, we will briefly distinguish it in four particulars.

(a) In Barker v. Harvey the Indians concerned had voluntarily abandoned their occupancy, and by that fact alone had lost their possessory title,

quite irrespective of anything else that they did or failed to do. In the case at bar the land in controversy **has been immemorially occupied and is still occupied by the Indians** except as to parts thereof from which they have been wrongfully and forcibly expelled by appellees or their predecessors. (Complaint, Pars. V, IX, X.)

Two Mexican grants were relied upon by claimant in the Barker case (pp. 482, 493-498), one originally made to Pico in 1840, but not approved by the departmental assembly (p. 494), the other made in 1845 directly to Warner, claimant's grantor, and approved by the assembly (pp. 496, 497). The latter embraced the premises described in the former.

The commission held that claimant's right depended **entirely** on the second grant (p. 497), which it confirmed (p. 498). The expediente of this grant stated that the land claimed

"is and has for the last two years been vacant and abandoned * * * but said place belongs at the present time to the said Mission" (p. 494).

Also, on authority of one of the Mission Fathers, that:

"The Valley of San Jose can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the Mission" (p. 495).

The Supreme Court found as facts:

"The report of the justice of the peace was that the land had been for two years vacant and aban-

doned; that there were some property rights vested, **not in the Indians,** but in the Mission of San Diego, and the official of that Mission consented to the grant." (p. 498.)

And again:

"It thus appears that prior to the cession, the Mexican authorities upon examination **found that the Indians had abandoned the land"** (p. 499); with more to the same effect.

Here then, there was established by official Mexican investigation and judicially determined by the Supreme Court a fact **absolutely fundamental, and in itself conclusive of the whole case.** An abandonment being shown by the best evidence, the fee was **ipso facto** relieved of the Indian title, and **nothing more was necessary to the decision of the case.**

"They (grants) were valid to pass the right of the crown subject to their (Indian) right of occupancy; **when that ceased * * * by the abandonment of the Indians the title of the grantee became complete."**

U. S. v. Fernandez, 10 Pet. 303, 305.

"The fact of the abandonment was the important one to be ascertained; **if voluntary, the dominion of the crown over it was unimpaired in its plenitude;** if by force, the Indians had the right, whenever they had the power or inclination, to return."

U. S. v. Arredondo, 6 Pet. 689, 747.

"The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it

is only a right of occupancy. The possession, **when abandoned by the Indians,** attaches to the fee without further grant."

U. S. v. Cook, 19 Wall. 591.

The legal speculations in the first part of the Barker case are therefore dicta.

(b) In the Barker case the unapproved Pico grant of 1840 contained a prohibition against molesting the Indians (p. 493). The approved Warner grant of 1845, however, said nothing about them (pp. 495-6), in all probability because they had already relinquished their rights by abandoning the premises. The latter was the grant that was confirmed. The Supreme Court says:

"**No such condition** (of non-interference) **was attached to the subsequent grant to Warner.**" (p. 498.)

And again:

"The Mexican authorities * * * **made an absolute grant subject only** to the condition of satisfying whatever claims the Mission might have. How can it be said, therefore, that when the cession was made by Mexico to the United States, there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, **and carried with it an affirmation that they had abandoned their occupancy,** and that whatever of title there was outside of the Mexican nation, was in the Mission, and **an absolute grant was made subject only to the rights of such**

Mission. For these reasons we are of opinion that there is no error in the rulings of the Supreme Court of California." (p. 499.)

In the case at bar the grant was made on the express condition that the grantees "must not interfere with the cultivation and other advantages that the Indians who are found established in said place have always enjoyed." The grant containing this stamp of affirmation and approval of the Indian occupancy by Mexico was confirmed by the commission.

When, therefore, the Barker case reached the courts, the Indian title was non-existent by reason of abandonment, and **the Mexican government, recognizing this fact, made an absolute grant;** while in our case the Indian occupancy existed before the grant, **was recognized and confirmed by Mexico in the grant,** and has continued down to the present time. How could two cases be more dissimilar?

(c) There being, therefore, in the Barker case, a perfectly simple set of facts on which the decision is finally based, what is the effect of the legal theories discussed in the first half of the opinion? Obviously they are entirely unnecessary to the result, and therefore should be considered as dicta.

In the recent case of Union Tank Line v. Wright, 249 U. S. 275, 283-4, Georgia assessed the property of a tank line in that state on the basis of "ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia, and the railroad mileage traversed by its equipment everywhere." (p. 279.)

The Supreme Court in Pullman Company v. Pa., 141 U. S. 18, had said:

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. **This was a just and equitable method of assessment;** and if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock and no more."

On appeal by the Tank Company from the assessment, Georgia relied upon the above holding as conclusive; but the Supreme Court did not find it so. It says (p. 283):

"Pullman's Palace Car Co. v. Pa., **supra,** relied upon by defendant in error, contains the following passage which **seems to uphold the Georgia rule** (quoting the above passage). * * * But the point therein spoken of was **unnecessary to the determination of the cause;** and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, **it must be regarded as obiter dictum and we cannot now approve or follow it.**" (p. 284.)

Proceeding to discuss the Pullman case, the Court concludes:

"In such circumstances the reasonableness of the rule was not really in question and what was said of it cannot control here **where the very point is presented for decision.**" (p. 286.)

So in the Barker case the Indian title had been in fact abandoned and lost. There was, therefore, no conceivable question as to Indian duty to present before the commission a possessory right they had long since given up; and the other questions, whether they were "third persons," or whether, if their title had persisted, lands encumbered with it could still be public domain, were purely academic.

In Joplin Mercantile Company v. U. S., 236 U. S. 531, 538, it appears that the Circuit Court of Appeals of the 8th Circuit had held that a certain statute was not repealed as to intrastate commerce, notwithstanding two previous decisions of the Supreme Court apparently intimating the contrary. The Supreme Court upheld it in this view, saying:

"As was well said by Mr. Chief Justice Marshall in one of his great opinions, Cohens v. Virginia, 6 Wheat. 264, 399: 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. **If they go beyond the case,** they may be respected, **but ought not to control the judgment in a subsequent suit when the very point is presented for decision.**' "

It has been shown that the first half of the Barker decision goes entirely "beyond the case" then before the court. Now, however, appellant comes with a set

of facts vitally different, and for the first time requiring a decision on the points of law heretofore academically discussed. That discussion "ought not to control the judgment" here. Discussion of points of law not necessary to a decision has no higher authority than the cogency of its reasoning. It is not controlling, and is persuasive only so far as it is sound.

To the same effect as the above cases see:

McCormick Machine Co. v. Altman, 169 U. S. 606, 611.

American Surety Co. v. U. S. (C. C. A. 5th Ct.), 239 Fed. 680, 684.

Northwestern, etc., Co. v. Caldwell (C. C. A. 8th Ct.), 234 Fed. 491, 498.

Schaap v. U. S. (C. C. A. 8th Ct.), 210 Fed. 853.

(d) But we have not exhausted the points of distinction between the Barker case and ours. The facts specially relied on in the **obiter dictum** are also distinguishable.

Our third point is that in the Barker case the Indian claim is treated by the Court as though **solely founded on the provision for their protection in the first and unconfirmed grant.**

"If these Indians had any claims **founded on the action of the Mexican government,** they abandoned them by not presenting them to the commission for consideration." (p. 491.)

Since Section 8 of the Act of 1851 required the presentation only of claims arising "by virtue of any

right or title **derived** from the Spanish or Mexican government" it was only "claims **founded on the action of the Mexican government**" which could by any stretch of construction be brought within the section. The court evidently considered that such a claim was before it. Our claim, however, is different. It is no more **founded** on the action of the Mexican government, than, if land comes into the ownership of X already charged with an easement, and X conveys the fee specially mentioning and excepting the easement in his deed, the right to the easement would be founded on the exception in X's conveyance. Our claim is based primarily on the general and immemorial Indian title, of which the provision in the grant was not the foundation, but merely a recognition and protection.

(e) Our fourth point of distinction is that in the Barker case the Indians are treated as claiming that **their occupancy was so fixed and permanent that no one could extinguish it, not even the government.** They are said to have claimed "a right of permanent occupancy" and it is stated that "the government of Mexico had always recognized the permanence of their occupancy." (p. 482.)

What the court understood by "permanent occupancy" is shown on pages 491-2, where it says:

"If it be said that the Indians do not claim the fee, but only the right of occupation * * * it may be replied that a claim of a right to **permanent occupancy** of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of **permanent occupancy** were a

part of the public domain, and **subject to the full disposal of the United States.** There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of a prior government to a **right of permanent occupancy,** for in the latter case the right, which is one of private property, antecedes and **is superior to the title of this government, and limits necessarily its power of disposal''**—with more to the same effect.

Clearly the Supreme Court had, or supposed it had, before it an assertion of an occupancy fixed, immutable and permanent beyond the power of the United States to extinguish it. Otherwise it would not have ignored the score or more of its own decisions holding that the Indian right is one of possession, **perpetual except as against the government, but always subject to the government's right to acquire it.** Some of these cases are quoted in paragraph 3 of our main argument.

No such claim of inextinguishable occupancy is made in the case at bar. Our claim is that the Indian right was original, and indefeasible except as against the government; that Spain or Mexico had the right to extinguish or acquire it, but did not; that the latter on the contrary, in accordance with the uniform tenor of its laws, made clear that the intention of the grant was not to extinguish it, and warned the grantees against interference; that, however, it still retained the right to acquire it later if so disposed, just as the United States has often granted

land subject to the Indian title which it has later acquired; that the confirmation by the commission and the issuance of the patent left the situation unchanged; and that the United States has still the right to extinguish this or any similar Indian title, but that appellees have no right to do so. This is as different from the position rejected in Barker v. Harvey as white from black.

From all this it is clear that the Barker case is radically and vitally distinct from the case at bar; that not only were different facts then before the Court, but that different theories of law were urged and passed on; and that this court is at liberty to decide the instant issues untrammeled by that decision.

(f) It is worth mentioning that all cases given in Shepard's United States Citations as citing Barker v. Harvey have been examined and nothing whatever found inconsistent with any of our contentions, or affirming any of the views we have criticized. Indeed in Minnesota v. Hitchcock, 185 U. S. 373, decided a year after the Barker case, the opinion, written by the same judge, upholds as against a state claim for school lands the Indian occupancy title to lands unceded by them, relying on many of the cases cited by us, and saying on page 389:

"Confessedly the fee of the land was in the United States subject to a right of occupancy by the Indians. **That fee the government might convey,** and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee would acquire a perfect and unburdened title and right of possession. At the

same time the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

Later the court emphasizes by many citations the rule that under government policy and statutory construction alike—

"It is a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress."

Either this case overrules Barker v. Harvey, in regard both to principles of construction and to the idea that land occupied by Indians cannot be public domain, subject to conveyance by the government, or else it shows that the court supposed it had before it in the Barker case a totally different situation from that here presented.

12. **The Barker case is no more binding upon this court than the other decisions of the Supreme Court inconsistent therewith.**

Finally we submit that even if Barker v. Harvey were as identical with our case as it is different from it, this court would not be driven to an affirmance here. Its binding force is exactly as great as that of any other Supreme Court decision and no greater. When, therefore, it is found that each and every one of its assertions which appellees construe as favorable to them, is contradicted not by one but by a mass of decisions of the same tribunal, this court is either free to exercise an independent judgment,

or, if there is any constraint, it is obliged to follow the imposing array of cases upholding appellant's position. So far as authority goes, each one of them is as compelling as the Barker case.

We submit that the reasons presented for reversal are conclusive. Bearing in mind the sacredness and dignity of the Indian title, which yet is held by a helpless people, **non sui juris,** needing and uniformly receiving the fostering care of courts and Congress alike; the recognition and protection of it by Mexico when the fee title passed into private ownership; the treaty pledge of our national faith to preserve it; the tenderness for similar Indian rights shown by Congress in synchronous and subsequent enactments; and the established fact that throughout our history the Indian title has never been extinguished casually, silently or without compensation, the Court will approach the Act of 1851 looking to find these things respected therein and not nullified.

It will observe that under appellant's construction the Act is a plain, just and reasonable enactment, consistent with the above principles, well adapted to distinguish private land from public domain, but leaving the Indian rights attaching to either to await the action of Congress, enlightened by the report of the commission on that subject. It will find on the other hand that appellees' theory of the act contemplates an outrageous injustice, involves amazing absurdities, perverts the plain meaning of language, violates established principles of construction, contradicts doctrines repeatedly an-

nounced by the Supreme Court, including the general principles just stated above, and rests on a single case distinguishable both in fact and law from the case at bar.

The decision of the District Court should be reversed with directions to overrule the motion to dismiss and to fix a time for defendants to answer.

Respectfully submitted,

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